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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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SHELL OIL COMPANY, *et al.*,
*Petitioners,*

v.

THE DEPARTMENT OF ENERGY, *et al.*,
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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ROBERT H. BORK
142 Huntington Street
New Haven, Connecticut 06511
(203) 776-7662

J. WALLACE ADAIR
ROGER C. SIMMONS
STUART H. HARRIS
MARCIA D. WELSCH
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800

*Counsel of Record*
*for Petitioners*

December 8, 1980

[List of Attorneys on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

*Of Counsel:*

A. M. MINOTTI
Shell Oil Company
P. O. Box 2463
Houston, Texas 77001

*Attorney for Shell Oil Company*

ROBERT D. WILSON
Texaco Inc.
2000 Westchester Avenue
White Plains, New York 10650

*Attorney for Texaco Inc.*

LEWIS J. OTTAVIANI
Phillips Petroleum Company
1240 Adams Building
Bartlesville, Oklahoma 74004

*Attorney for Phillips Petroleum Company*

CARLA BISHOP
Coastal Corporation
9 Greenway Plaza, Suite 894
Houston, Texas 77046

*Attorney for Coastal States Gas Company (Coastal Corporation)*

JOHN E. BAILEY
The Gulf Companies
P. O. Box 3725
Houston, Texas 77001

*Attorney for The Gulf Companies*

CHARLES F. RICE
Mobil Oil Corporation
150 East 42nd Street
New York, New York 10017

*Attorney for Mobil Oil Corporation*

EDWARD A. MCFADDEN
Union Oil Company of California
911 Wilshire Boulevard, Suite 1140
Los Angeles, California 90017

*Attorney for Union Oil Company of California*

DAVID M. FRANCIS
MONA A. YOES
Conoco Inc.
P. O. Box 2197
Houston, Texas 77001

*Attorneys for Continental Oil Company (Conoco Inc.)*

## QUESTIONS PRESENTED

1. Whether Congress, in giving the Department of Energy almost unlimited powers to compel data creation, impliedly intended to give those powers to the antitrust enforcement agencies as well, thus raising serious due process and Fourth Amendment questions.

2. Whether the question expressly reserved for future cases in *LaSalle National Bank*, namely whether the "improper purpose" doctrine is a technical rule confined to tax summons enforcement matters or a basic rule prohibiting regulatory agencies from being used as information gathering tools for law enforcement agencies, should be resolved.

3. Whether the conflict between the United States Courts of Appeals for the Third Circuit and the District of Columbia Circuit concerning the general applicability of the "improper purpose" doctrine should be resolved.

## PARTIES

The parties appearing as plaintiffs-appellants before the United States Court of Appeals for the Third Circuit were Shell Oil Company, Texaco Inc., Phillips Petroleum Company, Coastal States Gas Corporation, Gulf Oil Corporation, Mobil Corporation, Union Oil Company of California and Continental Oil Company.* The parties appearing as defendants-appellees were the Department of Energy, James R. Schlesinger (Secretary, Department of Energy), the Energy Information Administration, Lincoln E. Moses (Administrator, Energy Information Administration), the Office of Management and Budget, James T. McIntyre, Jr. (Director, Office of Management and Budget).

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* In accordance with Rule 28.1 of the Rules of the Supreme Court, as amended, a listing of all parent companies, subsidiaries and affiliates of each of the named corporations is included as Appendix E to this petition.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals is reproduced at Appendix A and reported at 1980-2 Trade Cas. (CCH) ¶ 63,525 (3d Cir. 1980). The opinion of the District Court for the District of Delaware is reproduced at Appendix B and published at 477 F. Supp. 413 (D. Del. 1979).

## JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, entered on September 8, 1980, and reproduced at Appendix C, affirmed the judgment of the

United States District Court for the District of Delaware. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment of the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The following statutes involved in this case are set forth in Appendix D: 15 U.S.C. §§ 772, 796, 1311-14 (1976 & Supp. II 1978); 42 U.S.C. §§ 7111-12, 7133, 7135 (Supp. II 1978).

## STATEMENT OF THE CASE

### A. The Financial Reporting System.

This case challenges the lawfulness of the Financial Reporting System, pursuant to which the Department of Energy ("DOE") and its subagency, the Energy Information Administration ("EIA"), have compelled energy producing companies to create intricate data relating to all aspects of their respective operations. This challenge

is premised on undisputed facts revealing that, although the Financial Reporting System form was issued under the compulsory process powers of DOE and EIA, the form, in fact, was designed by the Department of Justice and the Federal Trade Commission ("FTC") to elicit information to be used in the antitrust law enforcement proceedings of those agencies. Much of the information compelled for this purpose is *not* necessary for the statutory responsibilities of DOE or EIA, was *not* desired by DOE or EIA, was in fact desired *solely* by the Department of Justice and FTC for law enforcement investigations and could *not* be obtained directly by those agencies for use in antitrust law enforcement proceedings initiated by either agency.

Development of the Financial Reporting System commenced in 1975 as an effort by the Federal Energy Administration ("FEA") "to collect information needed for the formulation of energy policy . . ." 40 Fed. Reg. 43,613 (1975). Relying upon Section 13(c) of the Federal Energy Administration Act of 1974 ("FEA Act"), authorizing the FEA to require reports and information "necessary to enable the [FEA] Administrator to carry out his functions under this chapter" (15 U.S.C. § 772 (c) (1976)), FEA proposed a form which would provide it "with comprehensive, consistent and up-to-date financial information about the petroleum industry and its components" and was "designed to obtain all necessary information with a minimum of difficulty." 40 Fed. Reg. 43,612 (1975).

The type and extent of information which FEA, later the DOE, perceived as relevant to its energy policy responsibilities are reflected in the form FEA initially proposed in September 1975 and the slightly modified form proposed in July 1977. In proposing the July 1977 form, FEA again stated that it "requires financial information regarding petroleum company operations to

fulfill its responsibility to formulate energy policy." 42 Fed. Reg. 35,187 (1977). Toward this end, FEA solicited comments regarding the possible elimination of various reporting requirements and the inclusion of additional requirements "that will serve the public policy analysis process." 42 Fed. Reg. 35,188 (1977).[1]

The July 1977 form, containing 600 individual requests for data, was concededly sufficient to satisfy FEA's statutory responsibilities. However, during 1977 and 1978, the Department of Justice and FTC recognized that the Financial Reporting System, if drastically modified, had potential use in antitrust law enforcement investigations. Those agencies informed FEA that a modified reporting system could be used as an antitrust enforcement tool and forcefully urged that the form be substantially overhauled. The Department of Justice and FTC thus commenced aggressive efforts, continuing over the next year and a half, to transform the Financial Reporting System form to permit those agencies to create and obtain detailed investigative data for use in antitrust law enforcement proceedings.

FTC officials, including Chairman Michael Pertschuk and Bureau of Competition Director Alfred F. Dougherty, repeatedly demanded that FEA, and later DOE, change the form so that it would aid "the FTC's analysis of antitrust issues in the energy sector" and permit "the development of informed antitrust initiatives." At the same time, FTC sought changes that would "have . . . real usefulness to the FTC's antitrust enforcement efforts," with the intent "that data [would] be made available to [FTC] on an individual company basis."

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[1] In July 1977, FEA continued to rely upon Section 13 of the FEA Act and added the Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. § 796 (1976 & Supp. II 1978), pursuant to which FEA was to file with the President and Congress quarterly reports containing energy information "necessary to assist in the formulation of energy policy." 15 U.S.C. § 796(a), (c) (1976).

Assistant Attorney General John H. Shenefield, head of the Justice Department's Antitrust Division, also urged drastic modification of the Financial Reporting System for antitrust law enforcement. Shenefield told FEA that the form proposed in July 1977 would be of "little use" to the Antitrust Division. Shenefield asked for "closer cooperation between the Antitrust Division and the FEA" so that the Department of Justice could play a significant role "in developing the kind of information requests helpful to us." Shenefield wanted "DOE to collect the data with a view towards DOJ needs and disclose it to DOJ once collected." [2] Toward these ends, both antitrust agencies met with the DOE in *ex parte* "nuts and bolts technical meeting[s]," the purpose and effect of which was to reformulate the Financial Reporting System to create and collect antitrust law enforcement investigative data.

On January 12, 1979, after almost two years of intensive efforts by Department of Justice and FTC officials to modify the form, DOE published its final Financial Reporting System form, containing 7200 individual requests for data. 44 Fed. Reg. 2758 (1979). At that time, DOE announced that individual company Financial Reporting System data would be shared with the law enforcement sections of the Department of Justice and FTC. 44 Fed. Reg. 2760 (1979). Twenty-seven energy-producing companies are presently required to

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[2] On August 4, 1977, the Department of Energy Organization Act ("DOE Act"), 42 U.S.C. §§ 7111 *et seq.* (Supp. II 1978), creating the DOE, was enacted. The statute was passed in light of a congressional recognition that "an increasing shortage of nonrenewable energy resources" (42 U.S.C. § 7111(1) (Supp. II 1978)) presented "a serious threat to the national security of the United States." 42 U.S.C. § 7111(2) (Supp. II 1978). In directing implementation of a Financial Reporting System, the DOE Act transformed into a mandatory statutory directive the prior discretionary authority of FEA to require energy-producing companies to create and to submit financial reports. 42 U.S.C. § 7135(h) (Supp. II 1978).

submit completed Financial Reporting System forms to DOE on an annual basis. DOE has announced plans to expand the reporting requirement to encompass 300 companies. 44 Fed. Reg. 2758 (1979).

In testimony before Congress on March 21, 1979, Assistant Attorney General Shenefield recognized limitations on the Department of Justice's compulsory process powers and explained the principal motivation underlying the efforts of the Department of Justice to revamp the reporting form. The Department of Justice's discovery powers were "limited to the specific enforcement investigations and not the general advisory functions" and the Department lacked statutory authority to compel broad-based Financial Reporting System data outside the context of a specific investigation. See Appendix D at 40.

As finally published, the redrafted form reflected the full extent of Department of Justice and FTC influence, including a wholly new format containing 7,200 individual requests for data, as compared with the 1975 form's 600 individual requests for data. The form requires energy-producing companies annually to create and submit to DOE intricate data pertaining to all aspects of their respective operations.

### B. Opinions Below.

The District Court and the Court of Appeals agreed that the facts pertaining to the extent, purpose and effect of Department of Justice and FTC influence on the design of the Financial Reporting System are not disputed. The District Court found that "[Department of Justice] and FTC officials participated actively over a significant period of time in making suggestions for modification of the then existing, proposed [Financial Reporting System] form," (477 F. Supp. at 425) that "many of the suggestions of these agencies were incorporated in the final version of the report form," (*id.*)

and that "the form differs from what it would have been without the participation of the [Department of Justice] and FTC in its development." *Id.* In fact, entire sections were added to the form at the behest of the antitrust enforcement agencies.

Although accepting these facts, the District Court concluded that, irrespective of the pu.poses for which Financial Reporting System data were compelled and their intended use, enforcement is mandated as long as the data "hav[e] value for energy policy planning purposes." *Id.* at 426.

In an unparalleled decision, the Court of Appeals held that the Department of Justice and FTC could circumvent statutorily prescribed compulsory process powers by resort to DOE's power to compel the Financial Reporting System. The Court of Appeals thus endowed DOE with compulsory process powers to collect a vast range of data not sought in good-faith pursuit of its statutory goals, but desired by the Department of Justice and FTC to supplement their information collection powers and to aid their law enforcement efforts. Since the Financial Reporting System form compels the creation of information which neither the Justice Department nor the FTC can compel on its own for use in antitrust enforcement proceedings, the Court of Appeals also imbued the antitrust agencies with compulsory process powers beyond those conferred by Congress.

## REASONS FOR GRANTING THE WRIT

This petition raises issues of great importance concerning the permissible sweep and intrusiveness of discovery by the antitrust law enforcement agencies and, more generally, the investigatory and discovery powers of all agencies and departments of the federal government.

The judgment below transformed investigative powers given by Congress to the DOE into discovery powers for the Department of Justice and the FTC. The investigative powers which Congress conferred on DOE are not only far broader and more intrusive than any power Congress gave the antitrust agencies, but greater than those they would possess under a general warrant forbidden by the Fourth Amendment.

The question of whether Congress intended these law enforcement agencies to have such powers is, we submit, reason enough to grant the writ. But, because the Department of Justice and the FTC acquired these enormous disvovery powers by use of DOE's powers to compel energy companies to create evidence, this case also raises the question of whether the "improper purpose" doctrine of *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), is more than a technical doctrine applicable only to Internal Revenue Service summons enforcement procedures or rests upon a more profound rationale applicable to other government agencies. The Third Circuit, while recognizing the general applicability of *LaSalle*, thus creating a conflict with the District of Columbia Circuit, failed to apply *LaSalle* "to prevent other forms of agency abuse of congressional authority and judicial process." 437 U.S. at 318 n.20. There is also an increasing amount of district court litigation on this subject, which this Court expressly left open for resolution in "[f]uture cases" in *LaSalle*. *Id.*

These questions will continue to arise and are ripe for resolution in this case.

## I. The Writ Should Be Granted to Determine Whether Congress, In Giving the Department Of Energy Almost Unlimited Powers of Data Collection for Planning Purposes, Impliedly Intended to Do Away with Limitations and Safeguards Deliberately Built Into the Discovery Powers Granted the Antitrust Agencies.

The enormous increase in the discovery powers of the antitrust enforcement agencies created by the judgment below, by itself and quite apart from the larger issues implicated, warrants review by this Court.

The Department of Justice's Antitrust Division and the FTC have extensive, but by no means unlimited, discovery powers. By making available to the Department of Justice and the FTC the full panoply of the investigatory powers of the DOE—powers appropriate to a department with responsibility for national planning with respect to vital resources, but not to law enforcement—the Third Circuit has endowed the law enforcement agencies with powers so contrary to American legal tradition and the constitutional values that underlie it that only the clearest expression of such an intention by Congress to accomplish such a transformation could justify the statutory interpretation. There is, however, no expression of such a congressional intent. To the contrary, the language, structure, and legislative history of the DOE Act demonstrate that Congress intended no such result.

### A. *In Its Only Explicit Treatment of the Subject, Congress Granted Much Narrower Discovery Powers to the Department of Justice and the Federal Trade Commission Than the Investigatory Powers It Granted the Department of Energy.*

A comparison of the discovery powers now lodged in the Department of Justice and the FTC with the investigatory powers of the DOE demonstrates the enorm-

ity of the change in law accomplished by the Third Circuit.

The Department of Justice's Antitrust Division has independent authority to obtain information for use in connection with civil investigations pursuant to the Antitrust Civil Process Act, 15 U.S.C. §§ 1311 *et seq.* (1976). Information so requested must be relevant to the specific enforcement investigation specified in the civil investigative demand. In addition, the Department of Justice may utilize the broad powers of the grand jury to gather information in connection with criminal antitrust investigations. With regard to post-complaint litigation, the Department may also use the broad subpoena powers of the United States district courts. All three methods of discovery contain various procedural safeguards designed to protect the rights of actual and potential defendants to law enforcement proceedings, including the right of the recipient to be advised of the nature and scope of the law enforcement proceedings for which the information is compelled, to be informed that he is suspected of violating specific provisions of the law, and to decline production of information not relevant to the suspected violation. 15 U.S.C. § 1312 (1976). Every one of these rights is lost when the Department of Justice gets the DOE to compel the generation of information for Justice's law enforcement purposes.

The FTC also has independent authority, pursuant to Sections 6 and 9 of the Federal Trade Commission Act, 15 U.S.C. §§ 46 and 49 (1976 & Supp. III 1979), and the Federal Trade Commission Improvements Act of 1980, § 13, Pub. L. No. 96-252, 94 Stat. 374 (1980), to obtain information for use in its antitrust investigations. Each of these methods of discovery, like those of the Department of Justice, contains procedural safeguards

designed to protect the rights of potential defendants to law enforcement proceedings.[3]

By contrast, the DOE, through its Financial Reporting System, can compel companies to create information which would never have been generated for independent business reasons, (42 U.S.C. § 7135(h) (Supp. II 1978); 15 U.S.C. § 772(c) (1976)), and hence could never have been reached by Department of Justice or FTC law enforcement discovery powers. While the DOE Act requires that information collected be "necessary to achieve the purposes of [the DOE Act]," (42 U.S.C. § 7135(h) (Supp. II 1978)) the Court of Appeals regards any and all information about the industry as relevant given the broad mandate of the DOE. Hence, there is no safeguard of any relevance requirement when the Department of Justice and the FTC appropriate the powers of the DOE. Moreover, the recipient of a DOE Financial Reporting System form is told only that the information provided will be used in formulating energy policy. He receives no notice that he is under suspicion, is not advised of the nature or scope of any proceeding to which the information purports to be relevant, and is not given any opportunity to object to the demand on grounds recognized by this Court in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950).

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[3] Congress clarified the scope of and limitations applicable to the FTC's compulsory process powers on May 28, 1980, through passage of the Federal Trade Commission Improvements Act of 1980, *supra*. By these amendments, Congress explicitly provided that information obtained pursuant to the FTC's Line of Business program "shall be used only for statistical purposes," and that "[i]nformation for carrying out specific law enforcement responsibilities of the Commission shall be obtained under practices and procedures in effect on the date of the enactment of the Federal Trade Commission Improvements Act of 1980, or as changed by law." Pub. L. No. 96-252, § 4, 94 Stat. 374 (1980).

These are extraordinary results, and a congressional intent to confer upon law enforcement agencies powers so foreign to the American legal tradition, and fraught with so many constitutional problems, ought to be clearly manifested and not assumed.

An examination of the statute, however, demonstrates not an intent by Congress to give the Department of Justice and the FTC such unprecedented power but, instead, an intention to withhold it.

### B. *The Text, Structure, and Legislative History of the DOE Act Demonstrate That the Department of Energy Was Not Intended to Act as a Discovery Arm of the Antitrust Law Enforcement Agencies.*

The DOE Act, which created EIA and assigned to it the functions of gathering, analyzing, and disseminating energy information, including development of a Financial Reporting System, nowhere mentions any responsibility of cooperating or coordinating with the Department of Justice or the FTC with respect to antitrust. 42 U.S.C. § 7135 (Supp. II 1978). Nowhere in the legislative history of the DOE Act, moreover, is there any reference to the notion that in the energy area, DOE was to become the investigative arm of the Department of Justice and the FTC. These are remarkable oversights if, as the court below held, an unprecedented power to require companies to create evidence was intended to be placed in the antitrust agencies. Such a revolution in the relationship of law enforcement to the private sector can hardly be supposed to have gone unremarked by any member of Congress.

The Court of Appeals attempted to find a warrant for its conclusion in the language of the DOE Act that the Financial Reporting System include information to permit "analysis of the competitive structure of sectors and functional groupings within the energy industry" and

on the stated objective of the DOE "to foster and assure competition among parties engaged in the supply of energy and fuels." 42 U.S.C. §§ 7112(12) and 7135(h)(2)(B) (Supp. II 1978). These are wholly inadequate bases from which to infer a power delegated through DOE to the Department of Justice and the FTC to require individual companies to create evidence for the enforcement agencies. Provisions such as these are commonplace in regulatory agencies and require only that the agency consider the effects of its regulatory actions upon competition.[4] In no other context has such language been construed as a mandate permitting the Department of Justice or the FTC to dictate investigative demands to another agency.[5]

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[4] The legislative history of the DOE Act confirms that DOE's competitive function was limited to consideration of the effects of its actions on competition. In comments on the objective of DOE "to foster and assure competition", the Conference Report stated: "This purpose is declarative of present law which requires agencies to give attention to antitrust principles in formulating regulatory policies and decisions." H.R. Conf. Rep. No. 539, 95th Cong., 1st Sess. 55-56 (1977).

[5] Analogous provisions are contained in numerous statutes which govern the actions of the Civil Aeronautics Board (49 U.S.C. § 1302(a)(7) (Supp. II 1978)), the ICC (49 U.S.C. § 10101(a)(4) (Supp. II 1978)), the FPC (15 U.S.C. § 717(a) (1976)), the Federal Communications Commission (47 U.S.C. § 302 (1976)), and other federal agencies. Courts have interpreted statutory directives to still other federal agencies that they make decisions in accordance with "public interest" as encompassing a duty to inquire concerning competition in the regulated industry. *See, e.g.*, the Natural Gas Act, 15 U.S.C. § 717(a) (1976), and *Atlantic Seaboard Corp.* v. *FPC*, 404 F.2d 1268 (D.C. Cir. 1968). Under the rationale of the Third Circuit in the present case, these agencies could become investigatory arms of the Department of Justice and the FTC, a result no one, and certainly not Congress, ever anticipated.

That no such interpretation was intended here is shown by Congress' plan in consolidating some energy-related data gathering programs into DOE but not others. Consistent with this selective incorporation, Congress did not preempt agencies which were not consolidated into the DOE from using their own subpoena powers. 42 U.S.C. §§ 7151-57 (Supp. II 1978). But when data collection authority in a field was given to DOE, the agency previously wielding that authority was deprived of it. Thus, when Congress transferred the Department of Interior's Bureau of Mines data collection authority to the DOE, it simultaneously took away that power from the Department of Interior. *See* 42 U.S.C. § 7152(d)(1) (Supp. II 1978).[6]

Purely as a matter of statutory construction, it is clear that Congress had no intention in the DOE Act of turning over to the Department of Justice or the FTC the enormous investigatory powers it created for the purpose of keeping itself and the DOE informed about this heavily regulated and increasingly crucial group of resources. The matter does not, however, rest upon pure statutory construction alone, for the question of a proper construction is heavily affected by the promixity of values protected by the Constitution.

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[6] Also indicative of congressional intent is the fact that while the DOE Act expressly provides that EIA shall "consult with the Chairman of the Securities and Exchange Commission" (42 U.S.C. § 7135(h)(3) (Supp. II 1978)), there is a conspicuous absence of any provision for consultations with the FTC or the Department of Justice. That Congress knows how to include the antitrust agencies when it intends their participation is shown by Title III of the Petroleum Marketing Practices Act, enacted in 1978, which authorizes the Secretary of Energy to "consul[t] with the Chairman of the Federal Trade Commission and the Attorney General," to conduct a specialized study. 15 U.S.C. § 2841 (Supp. II 1978).

### C. *The Third Circuit Court of Appeals' Construction of the DOE Act Raises Profound Constitutional Problems and Ought, for that Reason Alone, To Be Avoided.*

However broad the government's power to require information or documents from corporations, there is a point at which the Fourth Amendment limits that power. That point is reached and passed when the agency demand becomes the equivalent of a "general warrant or writ of assistance, odious in both English and American history." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 207 (1946). Although the present case has severe constitutional overtones, we do not argue here that DOE has been give unconstitutional powers. Nor need we even argue that Congress could not constitutionally have given to law enforcement agencies such massive and intrusive powers to compel the creation of evidence, though surely the matter admits of great doubt.

What we do contend is that the constitutional problems are sufficiently severe, and values emanating from the Fourth Amendment and the Due Process Clause of the Fifth Amendment press so heavily, that the statute should not be interpreted as the Third Circuit has read it without the clearest manifestation of an intention by Congress to accomplish so radical a change in law enforcement powers. *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, 48 U.S.L.W. 5022, 5032 (U.S. July 2, 1980); *Kent* v. *Dulles*, 357 U.S. 116, 129-30 (1958).

This Court expressed the safeguards required by the Fourth Amendment and due process in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950):

> Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. *Federal Trade Com.* v. *American Tobacco Co.*, 264 U.S. 298 . . . [1924]. But it is sufficient if the inquiry is

within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.

*California Bankers Association* v. *Shultz*, 416 U.S. 21 (1974), established that the Fourth Amendment applies to corporations, and this Court was careful to point out that the regulations challenged "do not authorize indiscriminate rummaging among the records of the plaintiffs" (*id.* at 62), and that the information required to be reported "is sufficiently described and limited in nature . . . so as to withstand the Fourth Amendment challenge" (*id.* at 67).

None of these safeguards are present where the Department of Justice and the FTC are permitted to demand that the DOE require the creation of information which, as the district court found, DOE would not have sought for its own purposes. The information is not limited by anything except the antitrust enforcement agencies' curiosity and need not be relevant to any investigation. Worse, the information may be relevant to a pending case, but because the company has to create it, the Department of Justice and the FTC could not have compelled its creation on their own.[7] This is worse than "indiscriminate rummaging among the records"; it is the indiscriminate power to compel the creation of records for indiscriminate rummaging. This goes beyond the powers government would have if general warrants and writs of assistance were permitted. The Third Circuit's rationale here conflicts sharply with that of the Seventh Circuit in *CAB* v. *United Airlines, Inc.*, 542 F.2d 394 (7th Cir. 1976), a case which construed the CAB's powers of discovery to avoid the very constitutional problems which press upon the statutory construction here.

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[7] Thus, for example, the Financial Reporting System requires companies to create and report data based upon transactions among the eight petroleum companies that are respondents in the FTC's pending proceeding against the very same eight companies. *In Re Exxon Corp., pending as* FTC Docket No. 8934.

**II. The Writ Should be Granted to Determine Whether the Question Expressly Reserved for Future Cases in *LaSalle National Bank*, Namely Whether The "Improper Purpose" Doctrine Is a Technical Rule Confined to Tax Summons Enforcement Matters or a Basic Rule Prohibiting Regulatory Agencies From Being Used As Information Gathering Tools For Law Enforcement Agencies.**

In *United States* v. *LaSalle National Bank*, 437 U.S. 298, 313, 316 (1978), this Court reaffirmed the "good-faith" limitation on an agency's use of compulsory process and the need "to determine whether the agency is honestly pursuing [its] goals . . . by issuing the summons." This Court explicitly held that "the good-faith standard will not permit the IRS to become an information-gathering agency for other departments, including the Department of Justice. . . ." 437 U.S. at 317.

The question of whether the "improper purpose" doctrine of *LaSalle* applies generally to agency investigative powers is one of very considerable importance to many agencies of government and to a private sector subject both to comprehensive regulation and to antitrust enforcement action. Petitioners submit that *LaSalle's* rule is essential to protect that due process and Fourth Amendment values discussed above. As this Court stated in *LaSalle*, "[t]hese requirements are not intended to be exclusive. Future cases may well reveal the need to prevent other forms of agency abuse of congressional authority and judicial process." *Id.* at 318 n.20.

Under the decision of the Court of Appeals, the Department of Justice and the FTC are able to circumvent the limitations statutorily placed upon them as law enforcement agencies by using powers appropriate to planning agencies. The result is that a company is required to create masses of information for DOE which, unknown to the company, turns out to be information for an un-

announced investigation, or even evidence in an ongoing trial, conducted by the Department of Justice or FTC. That is why the prophylactic rule of *LaSalle* must apply to agency investigation generally. If it does not, if it is a mere technicality applying only to tax summons enforcement, the strategem employed by the Department of Justice and the FTC here, with the cooperation of DOE, makes nullities of this Court's pronouncements and distinctions in *Morton Salt* and *California Bankers Association*.

The case for application of the *LaSalle* rule here is stronger than in the tax summons enforcement area. It is impossible to draw a bright-line distinction in cases like *LaSalle* because the civil and criminal aspects of tax investigations are inevitably intertwined. Thus, the question of where the IRS's function ends and the Department of Justice's begins is necessarily difficult to answer. No such problem exists here. Each agency has law enforcement functions with investigatory and discovery powers appropriate to those functions. There is no difficulty, therefore, in designing a *LaSalle* prophylactic rule of easy applicability: The Department of Justice and the FTC may not participate in the design of DOE's Financial Reporting System and may not receive from DOE the data created by companies in response to the Financial Reporting System.

The question of the general applicability of *LaSalle's* "improper purpose" doctrine is, therefore, one of great importance to the legitimate functions of government and a question with serious constitutional implications. For that reason, the question deserves resolution by this Court.

### III. The Judgment Below Conflicts With Decisions of Other Circuits Regarding the Extent to Which this Court's Holding in *LaSalle* Prohibits Federal Agencies From Using Their Compulsory Process to Obtain Information for Other Agencies.

There is a wide divergence among the courts regarding the extent to which *LaSalle* precludes other federal agencies from utilizing their respective compulsory process powers for purposes this Court held unlawful when pursued by the Internal Revenue Service.

Though this Court in *LaSalle* stated that "these requirements are not intended to be exclusive," 437 U.S. at 318 n.20, the District of Columbia Circuit in *SEC* v. *Dresser Industries, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,573 (D.C. Cir. 1980) (*en banc*), *cert. denied*, 49 U.S.L.W. 3372 (U.S. Nov. 18, 1980), disagreed. In *Dresser*, the District of Columbia Circuit held that the limitations imposed by this Court in *LaSalle* "applie[d] solely to the statutory scheme of the Internal Revenue Code" and refused to apply *LaSalle* to its review of a Securities and Exchange Commission subpoena. *Id.* at 97,997. The District of Columbia Circuit reasoned that the *LaSalle* rule was based primarily upon the fact that the Internal Revenue Service's civil authority ceased upon referral of a case to the Department of Justice, rather than upon any generally applicable division of agency functions. The present case and two other recent decisions of the Third Circuit stand in direct conflict with the holding of the District of Columbia Circuit in *Dresser*.

Other courts have applied *LaSalle* to compulsory process issued by agencies other than the Internal Revenue Service. *ICC* v. *Gould*, No. 79-2556 (3d Cir. June 30, 1980), *petition for cert. filed*, 49 U.S.L.W. 3190 (U.S. Sept. 30, 1980) (No. 80-403); *NLRB* v. *Interstate Dress Carriers, Inc.*, 610 F.2d 99, 112 (3d Cir. 1979);

*United States* v. *Art Metal-U.S.A., Inc.*, 484 F. Supp. 884, 887 (D.N.J. 1980); *SEC* v. *OKC Corp.*, 474 F. Supp. 1031, 1034 (N.D. Tex. 1979); *OKC Corp.* v. *Fourth National Bank of Commerce*, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,940 (N.D. Okla. 1979). *See also SEC* v. *Wheeling-Pittsburgh Steel Corp.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,619 (3d Cir. 1980), *vacated and rehearing en banc ordered*, No. 80-1375 (3d Cir. Sept. 23, 1980), wherein the Third Circuit is considering *en banc* the applicability of *LaSalle* to a Securities and Exchange Commission subpoena.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT H. BORK
142 Huntington Street
New Haven, Connecticut 06511
(203) 776-7662

J. WALLACE ADAIR
ROGER C. SIMMONS
STUART H. HARRIS
MARCIA D. WELSCH
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800

*Counsel of Record*
*for Petitioners*

December 8, 1980

Supreme Court, U. S.
FILED
DEC 8 1980
MICHAEL RODAK, JR., CLERK

80-924
No. ——

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1980

SHELL OIL COMPANY, *et al.*,
*Petitioners,*

v.

THE DEPARTMENT OF ENERGY, *et al.*,
*Respondents.*

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT H. BORK

J. WALLACE ADAIR
ROGER C. SIMMONS
STUART H. HARRIS
MARCIA D. WELSCH
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800

*Counsel of Record*
*for Petitioners*

December 8, 1980

[List of Attorneys on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

*Of Counsel:*

A. M. MINOTTI
Shell Oil Company
P. O. Box 2463
Houston, Texas 77001

*Attorney for Shell Oil Company*

ROBERT D. WILSON
Texaco Inc.
2000 Westchester Avenue
White Plains, New York 10650

*Attorney for Texaco Inc.*

LEWIS J. OTTAVIANI
Phillips Petroleum Company
1240 Adams Building
Bartlesville, Oklahoma 74004

*Attorney for Phillips Petroleum Company*

CARLA BISHOP
Coastal Corporation
9 Greenway Plaza, Suite 894
Houston, Texas 77046

*Attorney for Coastal States Gas Company (Coastal Corporation)*

JOHN E. BAILEY
The Gulf Companies
P. O. Box 3725
Houston, Texas 77001

*Attorney for The Gulf Companies*

CHARLES F. RICE
Mobil Oil Corporation
150 East 42nd Street
New York, New York 10017

*Attorney for Mobil Oil Corporation*

EDWARD A. MCFADDEN
Union Oil Company of California
911 Wilshire Boulevard, Suite 1140
Los Angeles, California 90017

*Attorney for Union Oil Company of California*

DAVID M. FRANCIS
MONA A. YOES
Conoco Inc.
P. O. Box 2197
Houston, Texas 77001

*Attorneys for Continental Oil Company (Conoco Inc.)*

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## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 79-2129

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SHELL OIL COMPANY, TEXACO INC., PHILLIPS PETROLEUM COMPANY, COASTAL STATES GAS CORPORATION and GULF OIL CORPORATION,

MOBIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, CONTINENTAL OIL COMPANY, INTERVENORS,
*Appellants*

v.

THE DEPARTMENT OF ENERGY; JAMES R. SCHLESINGER, Secretary, Department of Energy; THE ENERGY INFORMATION ADMINISTRATION; LINCOLN E. MOSES, Administrator, Energy Information Administration; THE OFFICE OF MANAGEMENT AND BUDGET; JAMES I. MCINTYRE, JR., Director, Office of Management and Budget

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

(D.C. Civil No. 79-0134)

---

Argued August 7, 1980

Before: ALDISERT, SLOVITER, *Circuit Judges*,
and RAMBO, *District Judge* *

(Filed September 8, 1980)

J. Wallace Adair, Esq.
Roger C. Simmons, Esq. (Argued)
Stuart H. Harris, Esq.
Marcia D. Welsch, Esq.
Howrey & Simon
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Thomas Herlihy, III, Esq.
Herlihy & Herlihy
805 Market Tower
901 Market Street
Wilmington, Delaware 19801
*Counsel for Appellants*

OF COUNSEL:

A. M. Minotti, Esq.
Shell Oil Company
P.O. Box 2463
Houston, Texas 77001
*Counsel for Shell Oil Company*

Robert D. Wilson, Esq.
Texaco Inc.
2000 Westchester Avenue
White Plains, New York 10650
*Counsel for Texaco Inc.*

---

* Honorable Sylvia H. Rambo, of the United States District Court for the Middle District of Pennsylvania, sitting by designation.

Lewis J. Ottaviani, Esq.
Phillips Petroleum Company
Suite 202-E Frank Phillips Building
Bartlesville, Oklahoma 74004
*Counsel for Phillips Petroleum Company*

B. Melvin Hurwitz, Esq.
Coastal States Gas Corporation
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
*Counsel for Coastal States Gas Company*

John E. Bailey, Esq.
The Gulf Companies
P.O. Box 3725
Houston, Texas 77001
*Counsel for the Gulf Companies*

Charles F. Rice, Esq.
Mobil Oil Corporation
150 East 42nd Street
New York, New York 10017
*Counsel for Mobil Oil Corporation*

Edward A. McFadden, Esq.
Union Oil Company of California
1650 E. Golf Road
Schaumburg, Illinois 60196
*Counsel for Union Oil Company of California*

David M. Francis, Esq.
Mona A. Yoes, Esq.
Continental Oil Company
P.O. Box 2197
Houston, Texas 77001
*Counsel for Continental Oil Company*

Alice Daniel, Esq.
Assistant Attorney General
James W. Garvin, Jr., Esq.
United States Attorney
Michael Kimmel, Esq. (Argued)
Attorney
Civil Division, Rm. 3631
Department of Justice
Washington, D.C. 20530
*Counsel for Appellees*

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## OPINION OF THE COURT

PER CURIAM:

Eight energy producing companies brought this action to challenge the annual financial reporting requirement (Form EIA-28) promulgated by the Administrator of the Energy Information Administration (EIA) of the Department of Energy (DOE). The district court, on cross motions for summary judgment filed by the parties after discovery, entered summary judgment for the defendants, and the companies appeal.

In essence, the companies attack EIA's implementation of the Federal Reporting System (FRS) on two grounds. First, they claim that EIA has no authority to require them to create and report the information requested. Second, they claim that dissemination by EIA of the information to other federal agencies, particularly the Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC), is unauthorized. The district court considered and rejected both arguments. *Shell Oil Co.* v. *Department of Energy*, 477 F.Supp. 413 (D.Del. 1979).

With respect to the creation of the data required to be supplied on Form EIA-28, the Department of Energy

Organization Act (DOE Act) explicitly mandates the Administrator of EIA to develop an energy-producing company financial report "designed to allow comparison on a uniform and standardized basis among energy-producing companies." DOE Act § 205(h)(2), 42 U.S.C. § 7135(h)(2) (Supp. II 1978). The statute also requires that the financial report shall be designed to permit, *inter alia*, "an evaluation of company revenues, profits, cash flow, and investments in total, for the energy-related lines of commerce in which such company is engaged and for all significant energy related functions within such company," *id.* § 7135(h)(2)(A), "an analysis of the competitive structure of sectors and functional groupings within the energy industry," *id.* § 7135(h)(2)(B), and "such other analyses or evaluations as the administrator finds is necessary to achieve the purposes of this chapter," *id.* § 7135(h)(2)(E). One of the purposes of the chapter is "to foster and assure competition among parties engaged in the supply of energy and fuels." DOE Act § 102(12), 42 U.S.C. § 7112(12) (Supp. II 1978).

Plaintiffs argue that the data which Form EIA-28 seeks to elicit is requested solely for antitrust purposes because of the impermissible influence of the DOJ and FTC, and that the data is not needed for energy policy purposes. Judge Stapleton found that the DOJ and FTC participated in making suggestions with respect to the design and content of the report form, and that many of their suggestions were incorporated in the final version of the report form. He rejected plaintiffs' claim that this shows that EIA-28 pursues an improper purpose, noting that "no meaningful dichotomy can be drawn between energy planning data and information concerning the presence or absence of competition in the energy industry." *Shell Oil Co.* v. *Department of Energy*, 477 F.Supp. at 426. Since the statute itself shows that Congress saw

a nexus between energy policy planning and competition, we cannot find that information which is sought because it may be relevant to antitrust policy and enforcement is, *ipso facto*, sought for an improper purpose. The district court stated that plaintiffs have failed to point out any specific inquiry of EIA-28 which is not designed to elicit information having value for energy policy planning purposes. *Id.* Plaintiffs, as appellants, have also made no such showing in this court. Implementation of the FRS by the EIA is discretionary agency action and the scope of judicial review, if any, is limited. *See* Administrative Procedure Act § 10, 5 U.S.C. §§ 701-706 (1976); *Littell* v. *Morton*, 445 F.2d 1207, 1211 (4th Cir. 1971). We find no basis to interfere with the agency's fulfillment of its statutory obligations to collect data. *See* Administrative Procedure Act § 6(c), 5 U.S.C. 555(c) (1976); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950).

Plaintiffs' other major argument is that the EIA is not authorized to disseminate the information collected to other federal agencies. Specifically, plaintiffs seek to prevent distribution of the information to the DOJ Antitrust Division and the FTC who may use that information for antitrust enforcement purposes. Plaintiffs claim that the distribution to other agencies is prohibited by the Trade Secrets Act, 18 U.S.C. § 1905 (1976). That statute bars only those disclosures which are "not authorized by law." The defendants point to a number of sources as providing the statutory authorization for such disclosure. Primarily, they rely on two provisions of the Federal Energy Administration (FEA) Act: section 52 of the FEA Act, enacted in 1976, which directs the FEA's office of Energy Information and Analysis, now the EIA, to establish a "National Energy Information System" containing energy information "appropriate to meet adequately the needs of" the Department of Energy, the Congress, and other agencies of the government hav-

ing "energy-related policy decisionmaking responsibilities," 15 U.S.C. 790a(a)(3) (Supp. II 1978), and section 12(f) of the original 1974 FEA Act, 15 U.S.C. 771(f)(1976), which directs the Comptroller General or the [EIA] Administrator, to disclose information "to other Federal Government departments, agencies, and officials for official use upon request." The district court persuasively analyzed the relevant statutory provisions in light of the contentions of the parties. *Shell Oil Co.* v. *Department of Energy*, 477 F.Supp. at 425-437. We affirm, essentially for the reasons stated by the district court.

The judgment of the district court will be affirmed.

## APPENDIX B

UNITED STATES DISTRICT COURT

D. DELAWARE

477 F. Supp. 413

Civ. A. No. 79-134

SHELL OIL COMPANY, TEXACO, INC., PHILLIPS PETROLEUM COMPANY, COASTAL STATES GAS CORPORATION and GULF OIL CORPORATION,

*Plaintiffs,*

MOBIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA and CONTINENTAL OIL COMPANY,

*Intervenors-Plaintiffs,*

v.

THE DEPARTMENT OF ENERGY, JAMES R. SCHLESINGER, SECRETARY, DEPARTMENT OF ENERGY, THE ENERGY INFORMATION ADMINISTRATION, LINCOLN E. MOSES, ADMINISTRATOR, ENERGY INFORMATION ADMINISTRATION, THE OFFICE OF MANAGEMENT AND BUDGET, JAMES T. MCINTYRE, JR., DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET,

*Defendants.*

Aug. 17, 1979

### OPINION

STAPLETON, District Judge:

### I. THE BACKGROUND

This suit is a challenge by eight major energy-producing companies [1] to an order of the Administrator of the

[1] The plaintiffs in this action are Shell Oil Company, Texaco, Inc., Phillips Petroleum Company, Coastal States Gas Corporation

Energy Information Administration ("EIA") of the Department of Energy ("DOE") directing that a group of 27 such companies file Form EIA-28, a report on company financial and operational data for calendar years 1977 and 1978.[2] Form EIA-28 is the first phase of the Financial Reporting System ("FRS"), which was mandated by Congress in Section 205(h) of the Department of Energy Organization Act ("DOE Act"), 42 U.S.C. § 7135 (Supp. 1977).

On June 16, 1978, after a lengthy period of development, pre-testing and consultation both within and outside the government, the EIA submitted to the Office of Management and Budget ("OMB") a proposed FRS report form. This submission was made pursuant to the Federal Reports Act, 44 U.S.C. § 3501, *et seq.* (1976). On July 17, 1978, the EIA and OMB held a joint public hearing on the subject of the proposed FRS report. *See* 43 Fed. Reg. 27056 (June 22, 1978). On October 10, 1978, OMB Director James T. McIntyre, Jr., issued his approval of the FRS report in a letter of that date to Secretary of Energy James R. Schlesinger. Administrative Record ("A.R."), Volume I, pp. 255-61. The approval was subject to a series of modifications and limitations and was limited to collection of FRS data for calendar years 1977 and 1978 only. *Ibid.*

Subsequent to that approval, the EIA distributed final copies of the approved FRS report to each of the 27 reporting companies on October 20, 1978. These forms

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and Gulf Oil Corporation. In addition, Mobil Corporation, Union Oil Company of California and Continental Oil Company are intervenor-plaintiffs herein. All of these companies are referred to hereafter as "plaintiffs".

[2] This Court has jurisdiction over the subject matter of this controversy under 28 U.S.C. § 1331. *See Chrysler Corporation* v. *Brown*, 441 U.S. 281, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979).

were accompanied by a set of instructions and a statement indicating the criteria the EIA intended to use in disseminating data received on FRS reports. These criteria permit disclosures to the Department of Justice ("DOJ"), the Federal Trade Commission ("FTC"), the Secretary of the Interior, and the Comptroller General in accordance with the following "guidelines":

> 1. EIA will provide disaggregated [i.e. company identifiable] EIA-28 data to a named agency in response to a written request from it which meets the following conditions:
>
> > (a) Contains a statement that the data requested is necessary to the requesting agency in carrying out its lawful duties and responsibilities.
> >
> > (b) contains an undertaking not to disseminate or disclose the disaggregated information provided by EIA outside the named agency except for disclosures determined by the named agency to be made (i) in connection with proceedings in which the named agency is or might be involved, (ii) in response to a Freedom of Information Act request, or (iii) in response to a written request from the General Accounting Office or from the Congress or any Committee of the Congress having jurisdiction.
> >
> > (c) contains an undertaking that in responding to a Freedom of Information Act request encompassing disaggregated data obtained from EIA, the named agency (i) will not make a discretionary release of any disaggregated information obtained from EIA which is exempt from mandatory disclosure under the Freedom of Information Act and (ii) will consult with and give great deference to the views of EIA in determining whether any information obtained from EIA falls within the exemptions

from mandatory disclosure; provided, however, that where the pertinent regulations of the named agency authorize the referral of Freedom of Information Act requests for records originating in another agency to that agency, the named agency shall refer any requests for EIA data to EIA for response.

(d) contains an undertaking that prior to disclosing any disaggregated data received from EIA in any manner outside the named agency, the named agency shall give EIA and the originator of such data ten days written notice of the proposed disclosure.

2. Prior to honoring a request from a named agency for access to disaggregated EIA-28 data, EIA will give the originator of such data ten days written notice before making the data available.

44 Fed. Reg. 2760 (January 12, 1979).

The report, instructions and guidelines were subsequently published in the *Federal Register* on January 12, 1979. 44 Fed. Reg. 2758. The original filing deadline for the 1977 FRS report was February 1, 1979, but at the request of the reporting companies that deadline was set back to April 1, 1979.

On March 15, 1979, plaintiffs filed this action. While many discrete claims are asserted in the complaint, its primary theme is that the development of the FRS report was improperly influenced by the Department of Justice and the Federal Trade Commission and that the end product is designed not for the primary purpose of securing data necessary for energy policy formulation but rather for the primary purpose of eliciting information useful to the DOJ and the FTC in fulfilling their responsibilities with respect to the antitrust laws.

The plaintiffs attack on three fronts. They challenge (1) the EIA's promulgation of the FRS report, (2) the OMB's clearance of the FRS report, and (3) the EIA's decision to share disaggregated FRS data with other federal agencies. The parties have filed cross-motions for summary judgment which encompass each of these attacks. Each will be analyzed in turn. A working knowledge of the patchwork pattern of relevant legislation is a necessary prerequisite to any such analysis, however.

## II. THE STATUTORY SETTING

### A. *Statutes of General Applicability*

#### 1. *The Trade Secrets Act, 18 U.S.C. § 1905*

This Act makes it a crime for any officer or employee of the United States to disclose any information relating to "trade secrets", "confidential statistical data", or other proprietary information,[3] other than as "authorized by law". Read literally, the Act prohibits unauthorized disclosures within the government, as well as disclosures to the public. While a number of opinions of the Attorney General have suggested, largely based on practical considerations, that this section was not intended to apply to inter-agency transfers of proprietary information, no court appears to have so held.

#### 2. *The Federal Reports Act, 44 U.S.C. § 3501, et seq.*

The Federal Reports Act, enacted in 1942, establishes a policy against duplication of information gathering efforts by federal agencies and, as a corollary, a policy in favor of inter-agency exchange of information. "In-

[3] In addition to trade secrets and confidential statistical data, the Act also protects proprietary information relating to "processes, operations, style of work" or the "amount or source of any income, profits, losses or expenditures of any person" or firm.

formation" is defined for purposes of the Act as "facts obtained . . . by the use of . . . report forms, . . . questionnaires, or similar methods calling either for answers to identical questions from ten or more persons" or for answers to certain types of questions from federal employees. 44 U.S.C. § 3502. In furtherance of these policies, the Act requires clearance of governmental requests for information by either the OMB or the Comptroller General. The Act specifically directs "all agencies . . . to cooperate to the fullest practicable extent at all times in making information available to other agencies." 44 U.S.C. § 3507.

The Act expressly addresses the problem of inter-agency exchange of confidential information. 44 U.S.C. § 3508. First, it assures that confidential information will have no less protection in the hands of a receiving agency than it had in the hands of the forwarding agency by providing that officers and employees of the receiving agency shall be subject not only to any restrictions on disclosure applicable to their own agency, but also to any restrictions upon disclosure applicable to the forwarding agency. Among other things, this means that data immune from public disclosure in the hands of a federal agency acquiring data retains that protection in the hands of a receiving agency after an inter-agency transfer. 44 U.S.C. § 3508(a).

The Act goes on to establish standards governing certain inter-agency transfers of confidential information. Under Subsection 3508(b), a "Federal agency", as defined in the Act,[4] retains discretion to pass on to any

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[4] Since 1973 the Act has defined "Federal agency" to exclude the GAO and "independent Federal regulatory agencies" like the FTC. The primary purpose of the amendment in that year was to transfer clearance authority for information sought by those agencies to the Comptroller General and most of the provisions of the original Act remain applicable to them. *See* H.R. Conf. Rep. No. 624, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. Code Cong. &

other "Federal agency" any information which, "at the time of collection" was not "declared . . . to be confidential" by it.[5] Thus, if it seems to the acquiring agency that the advantages of cooperation with other agencies are outweighed by the risk of uncooperativeness on the part of those from whom the information will be sought, it may declare that the information will be received on a confidential basis. Otherwise, the Act imposes no restriction on the acquiring agency's power to disclose to another agency. Even where information is obtained on a confidential basis, it may still be disclosed to another federal agency under the Act, (a) in the form of statistical totals or summaries, (b) with the consent of the person from whom it was obtained, or (c) when the receiving agency is authorized to compel disclosure of the same information. 44 U.S.C. § 3508(b).

Contrary to the contention of the plaintiffs in this case, Section 3508(b) does not protect all information which might be characterized by a court as confidential. The crucial question under that section is whether the information at issue was *declared* confidential by the collecting agency *at the time of collection* and thus was acquired on a confidential basis.

### B. *Energy Statutes*

#### 1. *The Federal Energy Administration Act, 15 U.S.C. § 761, et seq. ("FEA Act")*

This Act, passed in May of 1974, created the Federal Energy Administration ("FEA"). The Administrator of that Administration was granted broad information

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Admin. News, pp. 2523, 2533-2534. For a reason not reflected in the legislative history, the amended Act makes independent regulatory agencies subject to the provisions of Section 3508(a) but not the provisions of Section 3508(b).

[5] Or by a "superior authority".

gathering power. In particular, he was directed to "collect . . . and analyze energy information by categorical grouping . . . of sufficient comprehensiveness and particularity to permit fully informed monitoring and policy guidance with respect to the exercise of his functions under" the Act. 15 U.S.C. § 772(a). One of the Administrator's functions under the Act was to "promote free and open competition in all aspects of the energy field, prevent unreasonable profits within the various segments of the energy industry and promote free enterprise". 15 U.S.C. § 764(b)(5).

The Administrator's information gathering authority included the right to "require, by general or special orders, any person engaged in any phase of energy supply or major energy consumption to file with the Administrator in such form as he may prescribe, reports or answers in writing to such specific questions, surveys or questionnaires as may be necessary to enable the Administrator to carry out his functions under" the Act. 15 U.S.C.A. § 772(c).

The Comptroller General was given the responsibility of monitoring and evaluating the operations of the FEA, including the Administrator's information gathering activities. In order to carry out this responsibility, the Comptroller General was given "access to such data within the possession or control of the Administration from any public or private source whatever, notwithstanding the provisions of any other law." 15 U.S.C. § 771(a). In addition, the Comptroller may request, and in limited instances compel disclosure of, information possessed by persons engaged in any phase of energy supply or consumption if that information "relates to the purposes of . . . [the Act] including, but not limited to, energy costs, demand, supply, industry structure, and environmental impacts." 15 U.S.C. § 771(b).

The FEA Act contains two references to the Trade Secrets Act. First, Section 771(f) provides in part as follows:

> The Comptroller General may not disclose to the public any information which concerns or relates to a trade secret or other matter referred to in . . . [the Trade Secrets Act], except that such information shall be disclosed by the Comptroller General or the Administrator, in a manner designed to preserve its confidentiality—
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> (1) to other Federal Government departments, agencies, and officials for official use upon request;
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> (2) to committees of Congress upon request; and
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> (3) to a court in any judicial proceeding under court order.

The second provision referring to the Trade Secrets Act comes in the context of a section dealing with the disclosure of information to the public. It provides:

> Subject to the provisions of this . . . [Act, the Freedom of Information Act] shall apply to public disclosure of information by the Administrator: *Provided*, That notwithstanding said section, the provisions of . . . [the Trade Secrets Act], or any other provision of law, . . . all matters reported to, or otherwise obtained by, any person exercising authority under this chapter containing trade secrets or other matter referred to in . . . [the Trade Secrets Act] may be disclosed to other persons authorized to perform functions under this chapter solely to carry out the purposes of the chapter, or when relevant in any proceeding under this [Act].

15 U.S.C. § 773(b).

In August of 1976, Congress added a subchapter II to the Act which established an Office of Energy Information and Analysis headed by a Director who was to establish a "National Energy Information System". 15 U.S.C. § 790a. This System was to contain all information concerning energy supply and consumption necessary in order to meet the needs of the FEA, the Congress, and "other officers and employees of the United States in whom have been vested, or to whom have been delegated, energy-related policy decisionmaking responsibilities". *Ibid.*

Specifically to be included was such energy information as required "to define and permit analysis of . . . the institutional structure of the energy supply system, including patterns of ownership and control of mineral fuel and nonmineral energy resources and the production, distribution, and marketing of mineral fuels and electricity." 15 U.S.C. § 790a(b).

In addition to collecting data, the Director was also charged with the responsibility of reviewing "the energy information gathering activities of Federal agencies with a view toward avoiding duplication of effort and minimizing the compliance burden on business enterprises and other persons". He was to "recommend policies which, to the greatest extent practicable . . . provide adequately for the energy information needs of the various departments and agencies of the Federal Government, the Congress, and the public." 15 U.S.C. § 790e. In furtherance of the policy of inter-agency cooperation and information sharing, the Director was expressly granted access to energy information in the possession of any federal agency except in those situations where the disclosure would be expressly prohibited by law or where the other agency determined that disclosure would significantly impair the discharge of its responsibilities. 15 U.S.C. § 790g.

### 2. *The Energy Supply and Environmental Coordination Act, 15 U.S.C. § 791, et seq. ("ESECA")*

The ESECA, enacted in June of 1974, also confers broad information gathering authority on the FEA Administrator. He is authorized to "collect such energy information as he determines to be necessary to assist in the formulation of energy policy or to carry out the purposes of [the ESECA] or the Emergency Petroleum Allocation Act of 1973". The term "energy information" in this context is defined by the Act to include "(A) all information in whatever form on (i) fuel reserves, exploration, extraction, and energy resources . . . wherever located; (ii) production, distribution and consumption of energy and fuels wherever carried on; and (B) matters relating to energy and fuels such as corporate structure and proprietary relationships, costs, prices, capital investment, and assets, and other matters directly related thereto, wherever they exist". 15 U.S.C. § 796(a) and (e). It is thus apparent that the information gathering powers of the Administrator under the FEA Act and the ESECA overlap to a considerable degree. The ESECA expressly provides that the information gathering authority conferred by it is "not limited by, and not in limitation of, any other authority of the Federal Energy Administrator".

The ESECA contains the following provision with respect to confidential energy information:

> (d) Upon a showing satisfactory to the Federal Energy Administrator by any person that any energy information obtained under this section from such person would, if made public, divulge methods or processes entitled to protection as trade secrets or other proprietary information of such person, such information, or portion thereof, shall be confidential in accordance with the provisions of . . . [the Trade

> Secrets Act] except that such information, or part thereof, shall not be deemed confidential for purposes of disclosure, upon request, to (1) any delegate of the Federal Energy Administrator for the purpose of carrying out . . . [the ESECA] and the Emergency Petroleum Allocation Act of 1973, (2) the Attorney General, the Secretary of the Interior, the Federal Trade Commission, the Federal Power Commission, or the General Accounting Office, when necessary to carry out those agencies' duties and responsibilities under this and other statutes, and (3) the Congress, or any committee of Congress upon request of the Chairman.

15 U.S.C. § 796(d).

### 3. *The Nonnuclear Energy Research and Development Act, 42 U.S.C. § 5901, et seq. ("NERDA")*

This Act, passed in December of 1974, established an Energy Research and Development Administration which, as the name suggests, was intended to monitor and support research and development in the field of nonnuclear energy. The Administrator of this agency was directed to establish and maintain "a central source of information on all energy resources and technology in furtherance of the Administrator's research, development, and demonstration mission carried out directly or indirectly under" the Act. 42 U.S.C. § 5916. The Act goes on to provide as follows:

> The information maintained by the Administrator shall be made available to the public, subject to the provisions of [the Freedom of Information Act and the Trade Secrets Act] . . ., and to other Government agencies in a manner that will facilitate its dissemination: *Provided*, That upon a showing satisfactory to the Administrator by any person that any infor-

mation, or portion thereof, obtained under this section by the Administrator directly or indirectly from such person, would, if made public, divulge (1) trade secrets or (2) other proprietary information of such person, the Administrator shall not disclose such information and disclosure thereof shall be punishable under . . . [the Trade Secrets Act]: *Provided, further*, that the Administrator shall, upon request, provide such information to (A) any delegate of the Administrator for the purpose of carrying out this [Act] . . ., and (B) the Attorney General, the Secretary of Agriculture, the Secretary of the Interior, the Federal Trade Commission, the Federal Energy Administration, the Environmental Protection Agency, the Federal Power Commission, the General Accounting Office, other Federal agencies, when necessary to carry out their duties and responsibilities under this chapter and other statutes, but such agencies and agency heads shall not release such information to the public.

4. *The Department of Energy Act, 42 U.S.C. § 7101, et seq. ("the DOE Act")*

The DOE Act, passed in the Summer of 1977, established a Department of Energy under a Cabinet level Secretary. Among its responsibilities were the duties "to continue and improve the effectiveness and objectivity of a central energy data collection and analysis program" and "to foster and assure competition among parties engaged in the supply of energy and fuels". 42 U.S.C. § 7112(7), (12). In order to assist the Secretary in carrying out these functions the Act establishes the EIA. The Administrator of the EIA is charged with the responsibility "for carrying out a central, comprehensive, and unified energy data information program which will collect, evaluate, assemble, analyze, and disseminate data and information which is relevant to energy resource re-

serves, energy production, demand, and technology, and related economic and statistical information, . . ." 42 U.S.C. § 7135(a)(2). The Act further directs that the Secretary delegate to the Administrator the functions vested in him relating to the gathering and analysis and dissemination of energy information, as that term is defined in the ESECA. 42 U.S.C. § 7135(b). These energy information functions include those previously vested in the Administrator of the FEA under the FEA Act and the ESECA and in the Administrator of the Energy Research and Development Administration under the ERDA. In addition the Administrator is directed to perform all of the functions previously assigned to the Director of the Office of Energy Information and Analysis. 42 U.S.C. § 7135(b), (c).

In addition to the collection and analysis authority conferred upon the Administrator of the EIA directly and through delegation from the Secretary, he is ordered to implement a financial reporting system for major energy producing companies. 42 U.S.C. § 7135(h). He is specifically directed to produce a format for an energy producing company financial report for use during the second full calendar year following the effective date of the Act. The following portion of Section 205(h) of the Act designates the kind of information which this report shall elicit:

> . . . Such report shall be designed to allow comparison on a uniform and standardized basis among energy-producing companies and shall permit for the energy-related activities of such companies—
>
> > (A) an evaluation of company revenues, profits, cash flow, and investments in total, for the energy-related lines of commerce in which such company is engaged and for all significant energy-related functions within such company;

(B) an analysis of the competitive structure of sectors and functional groupings within the energy industry;

(C) the segregation of energy information, including financial information, describing company operations by energy source and geographic area;

(D) the determination of costs associated with exploration, development, production, processing, transportation, and marketing and other significant energy-related functions within such company; and

(E) such other analyses or evaluations as the Administrator finds is necessary to achieve the purposes of this chapter.

42 U.S.C. § 7135(h)(2).

The DOE Act mandates disclosure of all EIA information to all segments of the DOE, upon request. 42 U.S.C. § 7135(f). It also directs that such information shall be promptly made available to the public unless it is subject to an exemption from mandatory disclosure under the Freedom of Information Act ("FOIA"). In addition, the Act specifies that the above-quoted sections of the ESECA and the NERDA pertaining to disclosures "shall continue to apply to any information obtained by the Administrator under such provisions". 42 U.S.C. § 7135(g). Finally, the provision mandating the FRS program specifies that "the provisions of . . . [the Trade Secrets Act] shall apply in accordance with its terms to any information obtained by the Administration pursuant to this subsection. 42 U.S.C. § 7135(h)(7).

## III. FORMULATION AND PROMULGATION OF EIA-28

### A. *Reviewability*

Plaintiffs attack the manner in which the EIA developed and promulgated EIA-28 on a variety of grounds. First, they assert, the EIA, at the behest principally of the DOJ and the FTC, converted the FRS from an energy policy planning instrument to an antitrust enforcement tool and the EIA's information gathering authority is thus being used for an "improper" or "bad" purpose. Second, plaintiffs contend that even if I fail to find that the evolution of the FRS was pervaded by an improper purpose, I must nonetheless strike it down because it asks for antitrust information not intended by Congress to be captured by the FRS. Third, plaintiffs claim that the FRS fails to provide corporate respondents with adequate notice of the existence, nature and scope of the antitrust investigations for which particular information is sought. Fourth, they maintain that the requirement that they furnish the EIA with antitrust information under the FRS, when combined with the EIA's announced intention to provide that information to other agencies of federal government,[6] violates their procedural rights under a number of statutes including the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* (1977) ("APA"), Antitrust Civil Process Act, 15 U.S.C. § 1311, *et seq.* (1974), and Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 41, *et seq.* (1973). Finally, plaintiffs charge that the EIA's decision to promulgate the FRS was arbitrary and capricious and, accordingly, cannot be sustained.

Defendants take issue with each of plaintiffs' assertions. Preliminarily, however, they assert that the promulgation of EIA-28 was agency action "committed

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[6] 44 Fed. Reg. 2758, 2760 (January 12, 1979).

to agency discretion by law" and is, therefore, not subject to judicial review. I address this issue first.

Final agency action is subject to review under the APA "except to the extent that— . . .(2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). The Supreme Court has stated that judicial review of agency action is the rule, nonreviewability the exception, and that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967), quoting *Rusk* v. *Cort*, 369 U.S. 367, 379-80, 82 S.Ct. 787, 7 L.Ed.2d 809 (1962). The Court has also stressed the narrowness of the "committed to agency discretion" exception, stating that it is "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' S. Rep. No. 752, 79th Cong. 1st Sess., 26 (1945)." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 821, 28 L.Ed.2d 136 (1971). Courts have frequently found no law to apply when the challenged administrative action has involved application of highly technical expertise to a statutory mandate which affords the decisionmaker broad discretion. *See, e.g., Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 78 S.Ct. 752, 2 L.Ed.2d 788 (1958); *Local 2855, AFGE* v. *United States*, 602 F.2d 574 (3 Cir. 1979).

Defendants argue that this is such a case. The conclusion that "the content, organization, and particular data-element requirements" of the FRS are matters "committed to agency discretion", they say, "necessarily follows from the highly technical nature of the task of constructing a statistical report designed to" capture energy policy planning information. Defendants' Brief at 64-65. Thus, defendants assert, this Court has no law to apply to determine the utility of the FRS in accomplishing its

statutory mandate. "There is simply no meaningful way", it is said, "in which this Court can examine a single element, column or schedule of the FRS report and determine if the inclusion of such items in the report was a proper exercise of the Administrator's discretion." *Id.* at 66.

It is unnecessary to pass upon this argument because it simply misses the point of plaintiffs' challenge to the FRS. Significantly, plaintiffs have not objected to particular data-element requests. They have claimed, not that designated questions should have been drafted in a different manner, but that the information requested exceeds EIA's statutory mandate and violates their constitutional and statutory rights. These are claims as to which there clearly is "law to apply". The fact, then, that the construction of particular data-element requests may be "committed to agency discretion" is irrelevant. As the Third Circuit Court of Appeals has recently stated,

> Even when a court ascertains that a matter has been committed to agency discretion by law, it may entertain charges that the agency lacked jurisdiction, that the agency's decision was occasioned by impermissible influences, such as fraud or bribery, or that the decision violates a constitutional, statutory or regulatory command. For the APA circumscribes judicial review only "*to the extent* that . . . agency action is committed to agency discretion by law;" it does not foreclose judicial inquiry altogether.

*Local 2855, AFGE* v. *United States, supra*, at 580 (footnote omitted) (emphasis in original). Plaintiffs' challenges to the FRS report are, therefore, amenable to judicial review.

B. *The Merits*

While the plaintiffs' one hundred page statement of the facts uses more colorful vocabulary in describing the ac-

tivities of the EIA, the DOJ and the FTC than the defendants are willing to accept, the relevant facts are not in dispute. Beginning in the Spring of 1977, the FRS staff solicited the suggestions of several federal agencies with respect to the design and content of the FRS report form. DOJ and FTC officials participated actively over a significant period of time in making suggestions for modification of the then existing, proposed FRS report form. Among the purposes of these suggestions was to obtain information relevant to the antitrust responsibilities of the DOJ and the FTC. While the EIA made the ultimate decisions regarding the design and content of the report form and declined to adopt a number of suggestions vigorously pressed by the DOJ and FTC,[7] many of the suggestions of these agencies were incorporated in the final version of the report form, and to this extent, the form differs from what it would have been without the participation of the DOJ and FTC in its development. There is no dispute that the form, as ultimately promulgated, captures information about the respondents which would be relevant to an analysis of whether there are or are not antitrust violations in various lines of commerce in the energy industry. Finally, it is clear that the EIA intends to share FRS data with the DOJ and FTC in accordance with the "guidelines" it has published in the Federal Register.

Plaintiffs correctly point out that compulsory process issued by an agency for an improper purpose will not

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[7] In spite of the antitrust agencies' demands for information on profits divided between refining and marketing in the petroleum industry, for example, the FRS as ultimately adopted does not request such "split" data. Similarly, EIA-28 asks for coal reserves information with far less geographical breakdown than the DOJ and FTC insisted was necessary for antitrust enforcement purposes. A scan of plaintiffs' four volume "factual analysis", which purports to link specific DOJ and FTC suggestions to changes subsequently held in the FRS by the EIA, suggests that over half of those suggestions were rejected *in toto* by the EIA.

be enforced by a court.[8] They then ask this Court to find that the primary purpose of EIA-28 is to secure "antitrust enforcement information", rather than "energy policy making data", and to declare that, having been promulgated primarily for an improper purpose, it is not authorized by law. Plaintiffs fail to bring their case within the scope of the legal principle relied upon, however.

Significantly, plaintiffs have failed to point out a single inquiry of EIA-28 which they maintain is not designed to elicit information having value for energy policy planning purposes. Undoubtedly, one reason for this is that no meaningful dichotomy can be drawn between energy planning data and information concerning the presence or absence of competition in the energy industry. As Congress has recognized in its energy legislation, antitrust information concerning the energy industry is energy planning data. Indeed the short answer to plaintiffs' argument is that Congress intended FRS data to be utilized in ascertaining the presence or absence of competition in the energy industry and the use of FRS authority to collect data for that purpose is not a misuse or abuse of that authority.

The energy statutes summarized in the foregoing section clearly evidence the view of Congress that the presence or absence of competition in the energy industry is of crucial importance to energy planning and that the presence of competition is essential to attainment of the goals of that legislation. Indeed, Congress has command-

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[8] *See, e.g., United States* v. *LaSalle National Bank*, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1978); *Donaldson* v. *United States*, 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971); *United States* v. *Powell*, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964); *Reisman* v. *Caplin*, 375 U.S. 440, 84 S.Ct. 508, 11 L.Ed.2d 459 (1964); *United States* v. *De Grosa*, 405 F.2d 926 (3 Cir.), *cert. denied*, 394 U.S. 973, 89 S.Ct. 1465, 22 L.Ed.2d 753 (1969); *United States* v. *Serubo*, 460 F.Supp. 689 (E.D. Pa. 1978).

ed the Secretary to "promote free and open competition in all aspects of the energy field," 15 U.S.C. § 764(b)(5), and "to foster and assure competition among parties engaged in the supply of energy and fuels." 42 U.S.C. § 7112(12).

Given the central role of competition in the congressional view of the energy scene, it is not surprising that it required the collection of information which would be relevant to an analysis of the industry from an antitrust viewpoint. As previously noted, when Congress created the National Energy Information System, it declared that "at a minimum", it should contain sufficient information to permit analysis of "the institutional structure of the energy supply system including patterns of ownership and control of" energy resources, production, distribution and marketing. 15 U.S.C. § 790a(b).

Plaintiffs acknowledge this aspect of the National Energy Information System and the existence of other grants of authority clearly broad enough to cover the same subject matter. *E.g.*, 42 U.S.C. § 7135(b) and 15 U.S.C. § 796(a) and (e), (i). They argue, however, that these provisions contemplate "general" and "nationwide" data concerning competition and not the kind of "detailed" information elicited by EIA-28. This "detailed" information is concededly helpful in determining the presence or absence of competition in the energy industry, however, and given the congressional concern in this area it is difficult to conceive that it intended to withhold authority to obtain data of this kind.

Moreover, the plaintiffs' argument ignores the congressional FRS mandate itself. Congress, when it enacted the DOE Act, was concerned about the FEA's failure to achieve a satisfactory data base and went to considerable lengths to spell out what kind of information the FRS should secure. The program was to obtain such information on a company-by-company basis as would be

sufficient to permit "analysis of the competitive structure of sectors and functional groupings within the energy industry". It was to include such comprehensive data as revenues, profits, cash flow, investments, and costs. And, finally, the data were to be sufficiently detailed as to permit allocation of costs among the various functions of the company and "the segregation of [the company's] energy information, including financial information, describing company operations by energy source and geographical area." 42 U.S.C. § 7135(h)(2).

In sum, my analysis of Congress's energy legislation leads me to conclude that insofar as EIA-28 solicits information relevant to the presence or absence of competition in the energy industry, it does not pursue an improper purpose and, indeed, is carrying out an express mandate of Congress. It follows that, absent some other impediment, the EIA is entitled to the data it seeks. Plaintiffs' argument to the contrary is not the same as that sustained in the "improper purpose" or "bad faith" line of cases on which they rely. Since Congress intended FRS data to be used to determine the presence or absence of competition in the energy industry, this is not a case where the intended use of information sought by compulsory process is a use not contemplated by Congress when it authorized that process. Plaintiffs' "improper purpose" argument is thus, in reality, not an argument that something is going to happen which Congress did not intend, but rather an argument that the collection and analysis which Congress in fact intended to occur should not occur because experts employed by agencies other than the EIA played a role in the collection process and may also conduct the intended analysis. No case cited by plaintiffs supports this argument.

While plaintiffs' reply brief asserts that Congress intended to bar the EIA from consulting with the DOJ and FTC, the only support they can marshal for this

assertion is a reference to statutory provisions *requiring* the EIA to consult with specified agencies about specified matters. I decline to draw the negative inference which plaintiffs suggest, not only because the DOE Act expressly authorizes these three agencies to confer concerning their information needs,[9] but also because it is evident from Congress's concern for competition in the energy industry that it would not wish to bar the EIA from any available expertise.

Nor can I perceive any basis for holding that the EIA's intention of disclosing FRS data to the DOJ and the FTC should bar it from access to the information sought by EIA-28. First, as will appear hereafter, I find that Congress intended that the EIA would collect data for the benefit of the FTC and the DOJ and, accordingly, that there is nothing improper about its intending to do so. But even if the sharing of information with the DOJ and FTC had not been sanctioned by Congress, I would be unable to accept plaintiffs' argument that a response to EIA-28 should not be compelled. The rationale of the "improper purpose" or "bad faith" line of cases relied upon by plaintiffs is simply inapplicable where, as here, refusal to enforce agency process would frustrate fulfillment of the agency's proper function. As stressed earlier, Congress intended the EIA to collect and analyze data of the kind sought by EIA-28 and a court would not be justified in interfering with the execution of that intent even if it concluded there was a potential for subsequent misuse of the collected data. The problem in such a situation would not be with the collection of the data but with the subsequent misuse, and the remedy would be appropriately directed only against the subsequent misuse.

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[9] *See* 15 U.S.C. § 790e (1979 Supp.).

Wholly apart from their claim that EIA-28 was promulgated for an improper purpose, plaintiffs maintain that responding to EIA-28 would deprive them of rights secured by the Constitution, the APA, the FTC Act and Rules, and the Federal Rules of Civil Procedure. The rights referred to, however, are rights which plaintiffs claim they would have in the context of a judicial or administrative proceeding initiated by the DOJ or FTC. The claimed injury in each instance thus arises not from reporting to the EIA, but rather from the use of FRS information in some possible future proceeding which may be instituted by the DOJ or FTC. We do not know at this point, however, what use the DOJ and FTC will make of FRS data and what proceedings, if any, will be instituted by them.[10] If a proceeding is forthcoming, I agree with the Court of Appeals for the District of Columbia, that the initial decision with respect to plaintiffs' rights and the use of FRS data should be for the agency or court presiding over that proceeding to make in the context of a concrete controversy. *FTC Line of Business Report Litigation*, 193 U.S.App.D.C. 300, 323, 595 F.2d 685, 708 (D.C. Cir. 1978); *see also Atlantic Richfield Co.* v. *FTC*, 546 F.2d 646, 651 (5 Cir. 1977).[11]

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[10] Plaintiffs seek to draw a parallel between their case and those "improper purpose" cases involving agency or grand jury process designed to secure information for use in a pending or imminent criminal proceeding. There is no evidence in this record, however, of a pending or imminent criminal proceeding against any of the plaintiffs and plaintiffs' cases make it clear that the mere possibility that information sought by an agency may be used in a subsequent criminal prosecution will not bar enforcement of the agency process. *E.g.*, *Donaldson* v. *United States*, 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971); *Venn* v. *United States*, 400 F.2d 207 (5th Cir. 1968).

[11] Plaintiffs' argument that EIA-28 is arbitrary and capricious is primarily a restatement of their contention that the EIA is not authorized to collect antitrust information. Since I find that EIA-28 is authorized, I reject this contention.

## IV. OMB CLEARANCE

### A. *Reviewability*

The Federal Reports Act, 44 U.S.C. § 3501, *et seq.*, as earlier noted, requires federal agencies attempting to collect information from ten or more respondents by use of an identical form to obtain clearance of the form from either the Director of the OMB or the Comptroller General, depending on the nature of the agency seeking the information. 44 U.S.C. §§ 3509, 3512. The Director of the OMB granted conditional clearance of the FRS report on October 10, 1978. Plaintiffs challenge that clearance on a number of grounds. First, they claim that the EIA was required to obtain clearance of the FRS report from the General Accounting Office ("GAO"), rather than the OMB. Second, they assert that even if the OMB was empowered to clear the FRS report, it violated the Federal Reports Act and its own regulations by the manner in which it did so. Finally, they argue that improper influence of members of Congress and other federal agencies tainted the OMB's decision to clear the FRS.

Defendants maintain that the Court's power to address these arguments is limited because approval of an information form under the Federal Reports Act is a matter "committed to agency discretion" and thus unreviewable, and because, in any event, plaintiffs lack standing to challenge the OMB clearance on any ground. I conclude that the OMB's decision is reviewable and that plaintiffs have the requisite standing.

Once again, defendants' argument against judicial review is founded on an assertion that the controlling statute provides no criteria by which an exercise of agency discretion can be judged. Once again, defendants' argument is unpersuasive. As Judge Flannery of the

District of Columbia [12] and Judge Schwartz [13] of this Court have observed in closely analogous situations, "The Federal Reports Act . . . clearly sets forth two criteria under which the [clearing official] . . . is to make his review: avoiding unnecessary duplication and minimizing compliance burden".[14]

Moreover, since plaintiffs are among those required to respond to EIA-28 and, therefore, to shoulder whatever burden is associated with it, I conclude that they have a sufficient stake to satisfy Article III's case or controversy requirements and that they are "adversely affected" parties entitled to judicial review under the APA. 5 U.S.C. § 702.[15]

B. *The Merits*

1. *The clearance authority of the OMB*

Prior to 1973, the OMB was required to review all information-collection proposals which were subject to the Federal Reports Act. In that year, however, an amendment was passed vesting clearance authority in the Comptroller General with respect to information solicitations by "independent Federal regulatory agencies". 44 U.S.C. §§ 3509, 3512 (1969 and 1979 Supp.). The amendment fails to define that phrase. However, the Conference Report, while also failing to define the term, indicates that the purpose of the change was "to preserve the independence of the regulatory agencies to carry out the quasi-

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[12] *In re FTC Corporate Patterns Report Litigation*, 432 F.Supp. 291, 307-308 (D.D.C. 1977).

[13] *A. O. Smith Corp.* v. *FTC*, 396 F.Supp. 1125, 1132 (D.Del. 1975).

[14] 432 F.Supp. at 307-308.

[15] The availability of review under the APA makes it unnecessary to consider whether a private right of action exists under the Federal Reports Act. *See Chrysler* v. *Brown*, 441 U.S. 281, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979).

judicial functions which have been entrusted to them by the Congress." H. Rep. 93-624, 93rd Cong., 1st Sess. (1973), *reprinted in* [1973] U.S. Code Cong. and Admin. News pp. 2417, 2533. Accordingly, the Conference Report's nonexhaustive listing of agencies deemed by Congress to be "independent Federal regulatory agencies" includes only regulatory agencies with quasi-judicial functions. *Id.* at 2534.

The DOE Act vests the EIA Administrator with considerable independence in connection with the collection, analysis and publication of information.[16] It does not, however, confer upon the EIA any regulatory or quasi-judicial authority; nor does any other statutory provision or statement in legislative history. Accordingly, I conclude that clearance authority with respect to EIA information demands did not pass to the Comptroller General in 1973 and thus remains with the OMB.

2. *The decision of the OMB Director*

The decision of the OMB Director, as reflected in his clearance letter,[17] applies the applicable legal standards and clearly has a rational basis. Thus, it is difficult to understand plaintiffs' attack. Their first argument is that the OMB Director violated his duty under the Federal Reports Act to minimize burden and duplication by conditionally approving the FRS even though he found

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[16] Section 205(d) of the DOE Act, 42 U.S.C. § 7135(d), cited by plaintiffs, provides as follows:

> The Administrator [of the EIA] shall not be required to obtain the approval of any other officer or employee of the Department [of Energy] in connection with the collection or analysis of any information; nor shall the Administrator be required, prior to publication, to obtain the approval of any other officer or employee of the United States with respect to the substance of any statistical or forecasting technical reports which he has prepared in accordance with law.

[17] A.R., Vol. I at 255.

that "it will be burdensome for respondents and costly for the government when fully implemented." A.R., Vol. I at 255. This argument ignores the fact that the Act does not require the Director to *eliminate* burden and cost, but only to *minimize* them. The administrative record evidences that the Director complied with these policies in granting conditional approval of the FRS. He found, specifically, that the EIA had expended "substantial effort and reasonable care devoted to holding down burden and cost." *Ibid.* He advised, however, that implementation of the FRS must be "monitored closely to ensure that burden and cost are truly minimized," directed the DOE to identify existing reporting requirements made unnecessary by implementation of the FRS, and withheld approval of particular data-element requests so as to reduce the reporting burden. *Id.* at 255-261. In short, the record shows that the Director gave careful consideration to burden and duplication, as he was required to do under the FRS, and that he did not approve the FRS until satisfied that "the need for the information warrants the burden and cost involved." *Id.* at 255.

The plaintiffs' second argument is more difficult to follow. They assert, as I understand it, that the clearance was improper because the Director made his determination that the need for the information warranted the cost and burden involved without considering the value of the sought information for antitrust enforcement purposes. It is clear from the Director's certification letter that he did not consider the EIA determination to share data with the FTC and DOJ and accordingly, that he did not consider any possible value of the information to those agencies for antitrust purposes. But if the Director determined that the needs of the EIA for the information justified the cost and burden, it would hardly seem significant that possible value to other agencies was not taken into account.

Finally, plaintiffs criticize the OMB Director for failing to insist on an EIA determination, in accordance with OMB Circular No. A-40, as to "whether all of the items of information to be furnished . . . are essential to the central purpose of . . . such report form." The short answer is that the EIA did make and submit such a determination and the plaintiffs' refusal to recognize it as such is based on their erroneous view that "antitrust information" has no relevance to planning and policy making.

3. *Congressional influence*

Finally, plaintiffs urge me to nullify the OMB's approval of the FRS because, they say, that decision was "tainted" by the improper influence of members of Congress. In particular, they point to two letters, the former signed by Representative Morris Udall and Senators Edward Kennedy and Floyd Haskell, and the latter signed by Representative John Dingell, sent to the Director in the Summer of 1978. Both urge that the OMB act quickly in deciding whether to approve the FRS. Congressman Dingell's letter states, additionally, his view that the Director's review of a statutorily mandated information report under the Federal Reports Act can only be "*pro forma*", and that the OMB is not authorized to condition approval of the FRS on the EIA's agreement not to provide the information obtained to other federal agencies. Plaintiffs contend that this interference with the OMB's clearance decision was pervasive and can only be remedied by setting that decision aside. Defendants respond that the influence was of neither the kind nor the magnitude required to warrant nullification of the clearance decision.

The Third Circuit Court of Appeals addressed the question of undue congressional influence on administrative decisionmaking in *Gulf Oil Corp.* v. *FPC*, 563 F.2d 588 (3 Cir. 1977). In that case two subcommittees in the House of Representatives had convened hearings to deter-

mine why the Federal Power Commission had decided to conduct a lengthy show cause hearing rather than seek an immediate injunction. The Court held that the plaintiffs had failed to make the requisite showing of undue influence, citing three factors. First, it noted that the subcommittees' inquiry had concerned a matter of law and had not involved pressure with respect to a determination of disputed matters of fact. The Court observed that "A point of view—even bias induced by legislative interference—as to questions of law . . . does not necessarily render invalid an agency's decision" because "judicial review is fully capable of correcting bias as to legal questions". *Id.* at 612. The Court further concluded the influence complained of in *Gulf* did not require it to set aside the agency's action because the influence had been directed not to the merits of the adjudication, but merely to acceleration of the disposition and enforcement of the FPC's procedures. *Id.* at 611. Third, the Court refused to overturn the agency's action because there had been no showing that whatever influence may have been exerted had had any effect. *Id.* at 612.

These principles control here. For the most part the letters in issue merely urged the OMB to accelerate its review procedure. While Congressman Dingell did indicate his views on the applicable scope of review and the impropriety of approval conditioned on an agreement regarding confidentiality, these represented merely his views on matters of law, rather than an attempt to coerce a prejudgment of questions of fact then pending before the OMB. Finally, plaintiffs have come forward with no evidence suggesting that the influence purportedly exerted by members of Congress upon the OMB clearance review process had any effect whatever.[18] On the con-

[18] *D.C. Federation of Civic Associations* v. *Volpe*, 148 U.S.App. D.C. 207, 459 F.2d 1231 (D.C. Cir. 1972), is, therefore, inapposite. In that case the Court stated that under the "controlling principle

trary, the record reveals that the OMB carefully evaluated the FRS report for some four months, did not clear the report until satisfied that it accorded with the congressional policies announced in the Federal Reports Act and ultimately granted only conditional clearance. Thus, I conclude that the influence exerted by members of Congress was not improper and that, in any event, it had no effect on the OMB clearance review process.[19]

## V. INTER-AGENCY DISCLOSURE

### A. *Reviewability*

Plaintiffs assert that the EIA's decision, reflected in its "Guidelines", to disclose confidential FRS data to the DOJ, the FTC, the Secretary of the Interior and the Comptroller General is final agency action which adversely affects them, that they are accordingly entitled to judicial review of that decision under the APA, and that they are entitled to relief because that decision is "not in accordance with law". 5 U.S.C. § 706.

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of law" a showing that the challenged decision was "based in whole or in part on the [improper congressional] pressures" must be made. *Id.* 148 U.S.App.D.C. at 222, 459 F.2d at 1246.

[19] Plaintiffs also make the separate but related claim that the OMB's clearance decision should be vacated because undue influence was exerted on it by other federal agencies, particularly the DOJ, FTC and DOE. While the OMB did receive letters from each of these agencies urging speedy action in approving the FRS report, any influence which they exerted cannot be described as either improper or undue. Those agencies had a legitimate interest in EIA-28, and it was no more inappropriate to have their views before the Director than it was to have the views of the EIA before him. Moreover, given the desirability of having the comments of interested agencies and the remoteness of the possibility that agency action be improperly influenced by pressure from an entity having no purse strings control or other leverage over the decisionmaker, I believe a court should be slow to apply the improper influence doctrine in an inter-agency context.

Defendants respond, once again, that the issues raised by plaintiffs are not ripe for decision. The argument has two aspects. First, defendants say that no final decision has been made by the EIA regarding a specific disclosure and that no justiciable issue will be presented until a decision is made by that agency on a specific request from another agency. Second, they assert that some of plaintiffs' claims "focus on hypothetical proceedings involving the reporting companies, and that, at least as to these issues, plaintiffs must wait until such time, if ever, as an agency receiving FRS data threatens to use it in a way which plaintiffs claim to be improper". The latter argument has merit; the former is unpersuasive.

The present record demonstrates beyond peradventure that the EIA's decision to disclose confidential FRS data to the agencies named in its guidelines is a final one which will not be reviewed when specific requests are received and that requests from at least the DOJ and FTC are both inevitable and imminent. The EIA published its guidelines in the Federal Register and its Administrator has made it clear that disclosure with appropriate safeguards is the established policy of his agency. Any further proceedings by the agency when the requests are made will be limited to a determination of whether the requesting agency has satisfied the guidelines. On these facts, plaintiffs' primary argument that disclosure by the EIA to other agencies is barred by law presents solely a question of law which is as concrete as it will ever become.

As indicated in Section III, *supra*, I do, however, agree with defendants that, to the extent plaintiffs' claims turn on the possible improper use of FRS data by receiving agencies in litigation or agency proceedings, not yet initiated, the challenge must await specific action by those agencies. *In re FTC Corporate Patterns Report Litigation*, 432 F.Supp. 291, 313 (D.D.C. 1977), *aff'd*, 193 U.S.App.D.C. 300, 595 F.2d 685 (D.C. Cir. 1978).

B. *The Merits*

The linchpin of plaintiffs' argument is that the Trade Secrets Act, expressly made applicable to FRS data by Section 205(h)(7) of the DOE Act, makes it illegal for the EIA to disclose confidential data to anyone beyond the DOE, whether within the federal government or without. The first issue this raises is whether the Trade Secrets Act applies to disclosures to another federal agency rather than to the public. Read literally, it applies to such inter-agency transfers and, as noted above, no court appears to have held it inapplicable in that context. Moreover, when Congress was fashioning its rules with respect to energy information over the last five years, it appears to have interpreted the Trade Secrets Act as foreclosing inter-agency transfers of confidential information unless they are otherwise authorized. Thus, in both the ESECA and the NERDA, Congress made the Trade Secrets Act applicable to energy data gathered under those Acts and then expressly excepted specified inter-agency transfers. For this reason I will assume, without deciding, that the Trade Secrets Act applies to inter-agency disclosures.

The Trade Secrets Act does not forbid all inter-agency disclosure, however. It bars only disclosures which are "not authorized by law" and the ultimate issue to be resolved is thus whether the EIA is authorized by law to make disclosure of confidential FRS data to the DOJ and the FTC. The defendants do not rely on their guidelines as *authority* for such disclosures so we must look to the provisions of other federal statutes for that authority, and the issues raised in *Chrysler* v. *Brown*, 441 U.S. 281, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979), need not concern us.

As the plaintiffs concede, the Federal Reports Act establishes standards for certain inter-agency disclosures of confidential data. While plaintiffs argue to the con-

trary, it is clear that disclosure of the FRS data at stake in this case was not declared confidential by the EIA prior to the time for collection [20] and, accordingly, the Federal Reports Act does not prohibit disclosure. Indeed, one can argue with some force that this Act affirmatively authorizes the disclosure of confidential FRS data not declared confidential at the time of collection and, accordingly, renders the Trade Secrets Act inapplicable.[21] The Federal Reports Act is applicable to FRS information and would appear to dictate that such data be shared by all federal agencies, subject to the Act's restrictions regarding confidential data, in order to avoid burden to the private sector and save expense in the public sector. I find it unnecessary, however, to rule upon the relationship between the Federal Reports Act and the Trade Secrets Act. In the field of energy information I believe Congress has specifically, albeit somewhat asymetrically, articulated its intent with respect to inter-agency disclosures and I conclude that the provisions of its energy legislation should govern the question before me.

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[20] Plaintiffs cite several pages of the Federal Register for the proposition that the EIA has acknowledged the confidentiality of the data, but the pages cited, while recognizing that some of the data to be submitted may be confidential, expressly reserve a determination of the confidentiality of particular information. 42 Fed. Reg. 35188 (July 8, 1977); 44 Fed. Reg. 2760 (January 12, 1979).

[21] The argument is stronger with respect to the proposed disclosures to the DOJ than with respect to the proposed disclosures to the FTC. Section 3508(b), which specifically addresses confidential disclosure, speaks of disclosures by a "Federal agency" to another "Federal agency", and, as earlier noted, the 1973 amendment to the Act excluded "independent Federal regulatory agencies" from the definition of "Federal agency". Accordingly, while Section 3508(b), on its face, is applicable to inter-agency disclosure between the EIA and the DOJ, it is not applicable to inter-agency disclosure between the EIA and the FTC.

When Congress passed the DOE Act and mandated the FRS program, it did not see itself as conferring new authority with respect to the collection, analysis and dissemination of energy information. What it intended was, first, a still greater degree of centralization with respect to these functions than existed after the creation of the National Energy Information System and, second, an express directive that needed energy data, which the FEA had had the authority to obtain earlier but had not, be obtained. The House Committee, for example, commented with respect to the provision mandating an FRS program:

> . . . This provision neither expands nor limits the basic authority of the Federal Government to gather energy information; however, it does represent a new requirement that certain information—relating, for example, to the costs, profits, cash flow, and investments undertaken in the functional segments of integrated energy companies—be collected on a systematic basis from major energy producing companies. Previous discretionary authority to collect this sort of information has not been used by the Federal Energy Administration.

S.Rep. No. 164, 95th Cong., 1st Sess. 51, *reprinted in* [1977] U.S. Code Cong. & Admin. News pp. 854, 905.

The legislative history also reveals that the authority to disclose, like the authority to acquire, was to remain basically unchanged. The reference to the Trade Secrets Act at the end of the FRS provisions was viewed as comparable to the protection afforded proprietary data in earlier energy legislation and it was understood that "Existing law regarding the protection of confidential, proprietary information would not be changed." *Id.* at 905. With respect to the provisions of the Act continuing the express authority for inter-agency disclosures of information obtained under the ESECA and NERDA, 42

U.S.C. § 7135(g), the Conference Report makes it clear that no change with respect to existing disclosure rules was intended:

> The conferees do not intend references to these statutory provisions to be exclusive requirements of law governing confidentiality of data acquired by the Administrator, and other applicable law relevant to information acquired by the Administrator under different authority would continue to apply in the same manner as before transfer of these authorities to the Department of Energy.

H.R. Conf. Rep. No. 539, 95th Cong., 1st Sess. 60, *reprinted in* [1977] U.S. Code Cong. & Admin. News pp. 925, 930. It would thus appear that the answer to the pending question is to be found in the energy legislation which originally created the energy data authority consolidated in the Secretary and the EIA by the DOE Act.

I first turn to the FEA Act. Under that Act, the Administrator was not only given comprehensive authority to obtain all information relevant to his functions under that Act, but he was also directed to establish and maintain a "National Energy Information System" which would supply the energy informational needs of Congress as well as of all "officers and employees of the United States [who] . . . [had] been delegated, energy-related policy decisionmaking responsibilities." 15 U.S.C. § 790a. It will be recalled that the Administrator was also directed to further the congressionally mandated goals of avoiding duplication of effort by governmental agencies in the energy data field and of minimizing the compliance burden on business enterprises and other persons required to supply such data.

Given the purpose of the National Energy Information System and the express declaration of a policy favoring agency cooperation with respect to energy data, it is difficult to argue that Congress did not contemplate

disclosure of energy information by the Administrator at least to those other federal agencies who are vested with policy making responsibility in the energy area. It would, of course, be pointless for the Administrator to collect and analyze energy data necessary to another agency's function if disclosure of that information to the other agency was to be foreclosed. It is far more reasonable to assume that Congress anticipated inter-agency transfers of energy data and that where the data pertinent to the other agency's functions included proprietary information, as Congress was aware it frequently would, the transfers would include such data.

That Congress contemplated such dissemination is in no way inconsistent with its references, in the FEA Act and the legislative proceedings thereon, to the Trade Secrets Act and the importance of protecting proprietary information. The Trade Secrets Act had been enacted decades earlier. Its purpose, and the apparent purpose of its incorporation in the FEA Act, is preservation of the commercial value of trade secret and proprietary information. That value is put at risk only by disclosures to the public and by other disclosures which may result in its eventual use in the marketplace. When Congress fashioned the FEA it was aware that information confidential in the hands of one agency would, upon transfer to another agency, remain confidential in the hands of the receiving agency. Thus, the Conference Report relating to the creation of the Office of Energy Information and Analysis, for example, reflects that the conferees expected any "sensitive and confidential information" supplied to that Office by another federal agency would "be afforded the protection which such information would have received" in the agency supplying it.[22] Indeed, this result is mandated by the Federal Reports

[22] S. Conf. Rep. No. 1119, 94th Cong., 2d Sess. 78, *reprinted in* [1976] U.S. Code Cong. & Admin. News pp. 2027, 2054.

Act. 44 U.S.C. § 3508(a). Given this restriction on retransfer, there simply was no reason for Congress to sacrifice the efficiency provided by affording other agencies access to the National Energy Information System in order to protect the commercial value of trade secret and proprietary data.

The provisions of the FEA Act and the other energy legislation incorporated into the DOE Act are consistent with these views of the congressional intent. Section 12 of the FEA Act requires that proprietary information obtained under the Act be protected, but expressly authorizes the Administrator or the Comptroller General to disclose such information to other federal government departments and agencies for their official use as long as it is done "in a manner designed to preserve its confidentiality". 15 U.S.C. § 771(f). The plaintiffs suggest that this authority not be given its literal scope but rather that its application be limited, insofar as the Administrator is concerned, to information obtained by him from the Comptroller General. While the piece of legislative history they cite does support this view,[23] the wording of the subsection and its context will not permit

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[23] *See* S. Conf. Rep. No. 788, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Admin. News, pp. 2972, 2978:

> The Conference substitute also incorporates a provision in the House bill (section 14(b)) reiterating the prohibition in 18 U.S.C. 1905 against disclosure to the public of trade secrets and other confidential data but making such information available by the Comptroller General or the Administrator to Congress, courts and Federal agencies for official use. The Senate amendment (section 119(e)) contained a comparable provision, but it did not specifically provide that confidential information could be disclosed to Congress, courts, or agencies.
>
> The provisions for disclosure by the Administrator contained in section 12(f) refer only to information received from the Comptroller General under section 12. Disclosure of information obtained by the Administrator from other sources is subject to section 14 of the conference substitute.

this construction. Neither the wording of this authorization nor the section in which it is found refers to information obtained by the Administrator from the Comptroller General. Section 12 speaks only of the Comptroller General's access to all data obtained by the Administrator under the Act and of the Comptroller General's authority for obtaining information from other sources to enable him to monitor the Administrator's performance of his statutory function. Thus, in context, both Section 12's protection against public disclosure and its authority for confidential, inter-agency disclosure apply to information secured originally by the Administrator as well as information secured by the Comptroller General.

More important, however, the Act must be construed as a whole in a manner which produces a rational scheme. Plaintiffs have suggested no reason why Congress might wish to distinguish inter-agency disclosure purposes, between information obtained by the Administrator and information of a similar character obtained by the Comptroller, much less why it might wish to authorize the Comptroller to disclose all FEA energy data to other federal agencies on a confidential basis and yet deny that authority to the FEA Administrator. In the absence of a satisfactory rationale for implying an unstated limitation on the provisions of Section 12, I am constrained to follow its literal meaning.

Contrary to plaintiffs' contention, Section 14 of the FEA Act, 15 U.S.C. § 773, does not limit the authority of the Administrator to share energy information with other federal agencies. That section deals solely with the subject of public disclosure and is clearly a grant of authority rather than a restriction. Section 14(b), upon which plaintiffs place primary reliance, provides generally that the FOIA shall apply to "public disclosures" of information by the Administrator. It goes on, however, to carve out two exceptions or "provisos"

from the general rule. The exception relevant here is the "proviso" that, notwithstanding the FOIA and the Trade Secrets Act, trade secret and proprietary data "may be disclosed to other persons authorized to perform functions under this [Act] solely to carry out the purposes of the [Act]." In short, the Administrator is authorized to make disclosure to anyone, in or out of government, where that disclosure is necessary to the carrying out of the Act and no restrictions on public disclosure are to interfere with that necessary function. Thus, for example, if the Administrator engages the services of a consultant pursuant to Section 7 of the Act, 15 U.S.C. § 766, he may disclose confidential data to him with the understanding that it is to be used solely for the purposes of his engagement by the Administrator.

Nor do I find that the inclusion in the ESECA and NERDA of explicit authority for inter-agency disclosure to four named agencies is a significant aid in construing the authority vested in the Secretary and the EIA Administrator by the DOE Act. As earlier noted, the legislative history of that Act indicates that its reference to the ESECA and NERDA disclosure provisions was not intended to raise any inference, negative or otherwise, about the authority of the Secretary or the EIA under earlier acts. Similarly, Congress expressly stated in the ESECA that the authority conferred with respect to energy data was "not in limitation of, any other authority of the Federal Energy Administrator" under earlier legislation such as the FEA Act. 15 U.S.C. § 796(g).

Plaintiffs' argument in favor of drawing a negative inference from the ESECA and NERDA disclosure provisions, however, fails primarily for want of a rationale. Although the EIA Administrator's power to collect information under the ESECA is extremely broad, plain-

tiffs concede that he is authorized to disseminate such information to other federal agencies. Under the FEA Act the EIA Administrator is empowered to collect precisely the same kinds of energy information, but plaintiffs contend that he is unable to disclose this information to other federal agencies. I have found nothing in these two Acts or their legislative histories which would explain why Congress might have intended such an anomalous result.[24] Accordingly, I decline to draw the negative inference for which plaintiffs contend.

In summary, I conclude that the EIA, by virtue of delegated authority originally conferred in the FEA Act, is authorized to disclose energy information, including proprietary data, to any federal agency vested with energy-related policy decisionmaking responsibilities (15 U.S.C. § 790), as well as to any other federal agency which has a legitimate need for that information in the exercise of its official responsibilities (15 U.S.C. § 771 (f)). Since the DOJ [25] and the FTC [26] are such agen-

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[24] It is true, as plaintiffs point out, that the EIA promulgated its FRS form under FEA and DOE Act authority rather than ESECA authority and that, arguably, a rulemaking proceeding may have been required to adopt it under the ESECA. But this difference in procedure, absent some difference in the kind of data involved, does not seem to me significant in the context of a Congressional decision on the desirability of confidential, inter-agency disclosures.

[25] The DOJ is vested with a number of energy-related responsibilities. Under 43 U.S.C. § 1337(c) (Supp. 1979), the Attorney General is authorized to review lease sales in the petroleum industry. Additionally, he is required, under 30 U.S.C. § 208-2 (Supp. 1979) to report to Congress on "competition in the coal and energy industries". The Attorney General is also required to assist the Secretary of the Interior in ensuring that no coal lease issuances or renewals violate the antitrust laws. Finally, under the Interstate Compact to Conserve Oil and Gas, P.L. 94-493, 90 Stat. 2365 (1976), the Attorney General is authorized to report to Congress on whether the actions of the states engaged in the Compact are consistent with the antitrust laws.

[26] Congress has delegated specific energy-related duties to the FTC under the Deepwater Port Act of 1974, *see* 33 U.S.C. § 1506,

cies, the EIA is authorized to disclose FRS data to them.

Supplementary to their primary argument that the EIA has no statutory authority for inter-agency disclosures and that such disclosures, accordingly, violate the Trade Secrets Act, plaintiffs also assert that the particular decision to disclose FRS data and the "Guidelines" for implementing that decision are infirm for three additional reasons.

First, plaintiffs maintain that the decision to disclose FRS data violated a section of the DOE Act which decrees that an exercise of the authority of the EIA Administrator in connection with the collection or analysis of information shall not require the approval of any other official of the DOE. 42 U.S.C. § 7135(d).[27] The predicate for this argument is a claim that Dr. Lincoln Moses, Director of the EIA, initially favored a policy of maintaining the confidentiality of certain proprietary data and that he "abdicated his statutory responsibility" in April of 1978 when he complied with the "command" of Secretary Schlesinger to adopt a policy of inter-agency disclosure.

The record does not reveal any participation by Secretary Schlesinger in the decision regarding the treatment to be given FRS data. The events of April 10,

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the Energy Policy and Conservation Act of 1975, *see* 42 U.S.C. § 6291, *et seq.*, and the FEA Authorization Act of 1977, *see* 15 U.S.C. § 788. These statutes aside, however, there can be no doubt that the FTC has a legitimate need for FRS data in the exercise of its official responsibilities. Under Sections 5 and 6 of the FTC Act, 15 U.S.C. §§ 45, 46, it is mandated to prevent unfair methods of competition, as well as to investigate, gather information and make reports concerning the competitive nature of business. These responsibilities require the Commission to concern itself with antitrust problems in the energy industry.

[27] This Section is quoted in full, *supra*, at page 429, n.16.

1978, related not to the EIA policy with respect to disclosure of FRS data, but to the DOE's general disclosure policy. The record shows, further, that the EIA made its FRS disclosure decision independently. Moreover, even if the evidence supported plaintiffs' factual contentions, I would be unable to agree that Secretary Schlesinger's participation violated the DOE Act. The Section of the Act on which plaintiffs rely deals not with disclosure, but with collection and analysis of data and states not that the EIA Administrator is *prohibited* from obtaining prior approval of his data collection and analysis activities, but only that he is not "*required*" to do so.

Next, plaintiffs allege that the decision to disclose FRS data was the product of undue influence from Congress, the DOJ and the FTC. As far as congressional influence is concerned, plaintiffs rely on four letters written by six members of Congress to either the Secretary or Deputy Secretary of Energy [28] concerning the DOE's policy on disclosure of confidential information. With respect to influence from the DOJ and FTC, plaintiffs point to a number of contacts between officials of those agencies and officials of the DOE in the course of which the DOE was urged to adopt a liberal disclosure policy.

No inference of improper influence can be drawn from the congressional letters. First, each of them discusses the legal aspects of disclosure rather than attempting to introduce factual bias into the disclosure decision. Second, the letters concern DOE disclosure policy in general and not one so much as mentions the FRS. Third, there is no evidence that any of them even found their way to

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[28] Two letters, one sent to Secretary Schlesinger, the other to Deputy Secretary O'Leary, were written by Congressman Dingell. A third was written by Senator Kennedy and sent to Schlesinger. A fourth was sent to the Secretary by Congressmen Udall, Moffett and Maguire.

the Director of the EIA who made the FRS disclosure decision.

With respect to the evidence of inter-agency contacts, I find nothing improper or surprising about two agencies expressing their views to a third on whether they should share data. As previously noted, Congress clearly wished such exchanges to occur.

Finally, plaintiffs seek to enjoin disclosure to the DOJ and FTC on the ground that the development and approval of the guidelines for disclosure were rulemaking and that the EIA did not follow the rulemaking procedures mandated by Section 553 of the APA. The short answer is that the guidelines come within Section 553's exception for "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A).

This exception to the notice and opportunity for comment requirements of Section 553 applies when the proposed rule has no "substantive impact on the rights and duties of the person subject to regulation. *Reynolds Metals Co.* v. *Rumsfeld*, 564 F.2d 663, 669 (4 Cir. 1977). *See also Texaco, Inc.* v. *Federal Power Commission*, 412 F.2d 740 (3 Cir. 1969). Here the proposed agency action had the effect solely of establishing guidelines to be applied by the agency in determining whether and how to share its information with other government agencies. Those guidelines require nothing of plaintiffs or other regulated entities and do not alter their rights or duties in any way. It follows that the hearing and comment provisions of Section 553 were not applicable.[29]

[29] The same conclusion was reached in a closely analogous context in *Reynolds Metals Co.* v. *Rumsfeld*, 417 F.Supp. 365 (E.D. Va. 1976). The plaintiff there challenged an agreement between the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance to exchange information concerning employer's compliance with anti-discrimination laws, including in-

## VI. CONCLUSION

For the foregoing reasons, the defendants' motion for summary judgment will be granted and the plaintiffs' motion for summary judgment will be denied.

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formation submitted by regulated companies. The court held that the agreement was a "rule" as defined by the APA but that notice and opportunity for comment were not required under Section 553 because it had no substantive impact on those supplying the data to be exchanged. The Court of Appeals for the Fourth Circuit subsequently affirmed and adopted the District Court's reasoning.

## APPENDIX C

## UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 79-2129

SHELL OIL COMPANY, TEXACO INC., PHILLIPS PETROLEUM COMPANY, COASTAL STATES GAS CORPORATION and GULF OIL CORPORATION

MOBIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, CONTINENTAL OIL COMPANY, INTERVENORS,
*Appellants*

VS.

THE DEPARTMENT OF ENERGY; JAMES R. SCHLESINGER, Secretary, Department of Energy; THE ENERGY INFORMATION ADMINISTRATION; LINCOLN E. MOSES, Administrator, Energy Information Administration; THE OFFICE OF MANAGEMENT AND BUDGET; JAMES I. MCINTYRE, JR., Director, Office of Management and Budget

(D.C. Civil No. 79-0134)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: ALDISERT and SLOVITER, *Circuit Judges* and RAMBO, *District Judge* *

### JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel on August 7, 1980.

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* Honorable Sylvia H. Rambo, of the United States District Court for the Middle District of Pennsylvania, sitting by designation.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered August 17, 1979, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

/s/ Sally Mrvos
Clerk

September 8, 1980

# APPENDIX D

## STATUTES INVOLVED

## A.

## DEPARTMENT OF ENERGY ORGANIZATION ACT

42 U.S.C. § 7111 (Supp. II 1978) provides:

**Congressional findings**

The Congress of the United States finds that—

(1) the United States faces an increasing shortage of nonrenewable energy resources;

(2) this energy shortage and our increasing dependence on foreign energy supplies present a serious threat to the national security of the United States and to the health, safety and welfare of its citizens;

(3) a strong national energy program is needed to meet the present and future energy needs of the Nation consistent with overall national economic, environmental and social goals;

(4) responsibility for energy policy, regulation, and research, development and demonstration is fragmented in many departments and agencies and thus does not allow for the comprehensive, centralized focus necessary for effective coordination of energy supply and conservation programs; and

(5) formulation and implementation of a national energy program require the integration of major Federal energy functions into a single department in the executive branch.

42 U.S.C. § 7112 (Supp. II 1978) provides:

**Congressional declaration of purpose**

The Congress therefore declares that the establishment of a Department of Energy is in the public interest and will promote the general welfare by assuring coordinated and effective administration of Federal energy policy and programs. It is the purpose of this chapter—

(1) to establish a Department of Energy in the executive branch;

(2) to achieve, through the Department, effective management of energy functions of the Federal Government, including consultation with the heads of other Federal departments and agencies in order to encourage them to establish and observe policies consistent with a coordinated energy policy, and to promote maximum possible energy conservation measures in connection with the activities within their respective jurisdictions;

(3) to provide for a mechanism through which a coordinated national energy policy can be formulated and implemented to deal with the short-, mid- and long-term energy problems of the Nation; and to develop plans and programs for dealing with domestic energy production and import shortages;

(4) to create and implement a comprehensive energy conservation strategy that will receive the highest priority in the national energy program;

(5) to carry out the planning, coordination, support, and management of a balanced and comprehensive energy research and development program, including—

(A) assessing the requirements for energy research and development;

(B) developing priorities necessary to meet those requirements;

(C) undertaking programs for the optimal development of the various forms of energy production and conservation; and

(D) disseminating information resulting from such programs, including disseminating information on the commercial feasibility and use of energy from fossil, nuclear, solar, geothermal, and other energy technologies;

(6) to place major emphasis on the development and commercial use of solar, geothermal, recycling and other technologies utilizing renewable energy resources;

(7) to continue and improve the effectiveness and objectivity of a central energy data collection and analysis program within the Department;

(8) to facilitate establishment of an effective strategy for distributing and allocating fuels in periods of short supply and to provide for the administration of a national energy supply reserve;

(9) to promote the interests of consumers through the provision of an adequate and reliable supply of energy at the lowest reasonable cost;

(10) to establish and implement through the Department, in coordination with the Secretaries of State, Treasury, and Defense, policies regarding international energy issues that have a direct impact on research, development, utilization, supply, and conservation of energy in the United States and to undertake activities involving the integration of domestic and foreign policy relating to energy, including provision of independent technical advice to the President on international negotiations involving

energy resources, energy technologies, or nuclear weapons issues, except that the Secretary of State shall continue to exercise primary authority for the conduct of foreign policy relating to energy and nuclear nonproliferation, pursuant to policy guidelines established by the President;

(11) to provide for the cooperation of Federal, State, and local governments in the development and implementation of national energy policies and programs;

(12) to foster and assure competition among parties engaged in the supply of energy and fuels;

(13) to assure incorporation of national environmental protection goals in the formulation and implementation of energy programs, and to advance the goals of restoring, protecting, and enhancing environmental quality, and assuring public health and safety;

(14) to assure, to the maximum extent practicable, that the productive capacity of private enterprise shall be utilized in the development and achievement of the policies and purposes of this chapter;

(15) to provide for, encourage, and assist public participation in the development and enforcement of national energy programs;

(16) to create an awareness of, and responsibility for, the fuel and energy needs of rural and urban residents as such needs pertain to home heating and cooling, transportation, agricultural production, electrical generation, conservation, and research and development;

(17) to foster insofar as possible the continued good health of the Nation's small business firms, public utility districts, municipal utilities, and pri-

vate cooperatives involved in energy production, transportation, research, development, demonstration, marketing, and merchandising; and

(18) to provide for the administration of the functions of the Energy Research and Development Administration related to nuclear weapons and national security which are transferred to the Department by this chapter.

42 U.S.C. § 7133 (Supp. II 1978) provides:

**Assistant Secretaries; appointment and confirmation; identification of responsibilities**

(a) There shall be in the Department eight Assistant Secretaries, each of whom shall be appointed by the President, by and with the advice and consent of the Senate; who shall be compensated at the rate provided for at level IV of the Executive Schedule under section 5315 of title 5; and who shall perform, in accordance with applicable law, such of the functions transferred or delegated to, or vested in, the Secretary as he shall prescribe in accordance with the provisions of this chapter. The functions which the Secretary shall assign to the Assistant Secretaries include, but are not limited to, the following:

(1) Energy resource applications, including functions dealing with management of all forms of energy production and utilization, including fuel supply, electric power supply, enriched uranium production, energy technology programs, and the management of energy resource leasing procedures on Federal lands.

(2) Energy research and development functions, including the responsibility for policy and management of research and development for all aspects of—

(A) solar energy resources;

(B) geothermal energy resources;

(C) recycling energy resources;

(D) the fuel cycle for fossil energy resources; and

(E) the fuel cycle for nuclear energy resources.

(3) Environmental responsibilities and functions, including advising the Secretary with respect to the conformance of the Department's activities to environmental protection laws and principles, and conducting a comprehensive program of research and development on the environmental effects of energy technologies and programs.

(4) International programs and international policy functions, including those functions which assist in carrying out the international energy purposes described in section 7112 of this title.

(5) National security functions, including those transferred to the Department from the Energy Research and Development Administration which relate to management and implementation of the nuclear weapons program and other national security functions involving nuclear weapons research and development.

(6) Intergovernmental policies and relations, including responsibilities for assuring that national energy policies are reflective of and responsible to the needs of State and local governments, and for assuring that other components of the Department coordinate their activities with State and local governments, where appropriate, and develop intergovernmental communications with State and local governments.

(7) Competition and consumer affairs, including responsibilities for the promotion of competition in

the energy industry and for the protection of the consuming public in the energy policymaking processes, and assisting the Secretary in the formulation and analysis of policies, rules, and regulations relating to competition and consumer affairs.

(8) Nuclear waste management responsibilities, including—

(A) the establishment of control over existing Government facilities for the treatment and storage of nuclear wastes, including all containers, casks, buildings, vehicles, equipment, and all other materials associated with such facilities;

(B) the establishment of control over all existing nuclear waste in the possession or control of the Government and all commercial nuclear waste presently stored on other than the site of a licensed nuclear power electric generating facility, except that nothing in this paragraph shall alter or effect title to such waste;

(C) the establishment of temporary and permanent facilities for storage, management, and ultimate disposal of nuclear wastes;

(D) the establishment of facilities for the treatment of nuclear wastes;

(E) the establishment of programs for the treatment, management, storage, and disposal of nuclear wastes;

(F) the establishment of fees or user charges for nuclear waste treatment or storage facilities, including fees to be charged Government agencies; and

(G) the promulgation of such rules and regulations to implement the authority described in this paragraph,

except that nothing in this section shall be construed as granting to the Department regulatory functions presently within the Nuclear Regulatory Commission, or any additional functions than those already conferred by law.

(9) Energy conservation functions, including the development of comprehensive energy conservation strategies for the Nation, the planning and implementation of major research and demonstration programs for the development of technologies and processes to reduce total energy consumption, the administration of voluntary and mandatory energy conservation programs, and the dissemination to the public of all available information on energy conservation programs and measures.

(10) Power marketing functions, including responsibility for marketing and transmission of Federal power.

(11) Public and congressional relations functions, including responsibilities for providing a continuing liaison between the Department and the Congress and the Department and the public.

(b) At the time the name of any individual is submitted for confirmation to the position of Assistant Secretary, the President shall identify with particularity the function or functions described in subsection (a) of this section (or any portion thereof) for which such individual will be responsible.

42 U.S.C. § 7135 (Supp. II 1978) provides:

**Energy Information Administration**

**(a) Establishment; appointment of Administrator; compensation; qualifications; duties**

(1) There shall be within the Department an Energy Information Administration to be headed by an Adminis-

trator who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall be compensated at the rate provided for in level IV of the Executive Schedule under section 5315 of title 5. The Administrator shall be a person who, by reason of professional background and experience, is specially qualified to manage an energy information system.

(2) The Administrator shall be responsible for carrying out a central, comprehensive, and unified energy data and information program which will collect, evaluate, assemble, analyze, and disseminate data and information which is relevant to energy resource reserves, energy production, demand, and technology, and related economic and statistical information, or which is relevant to the adequacy of energy resources to meet demands in the near and longer term future for the Nation's economic and social needs.

**(b) Delegation of functions**

The Secretary shall delegate to the Administrator (which delegation may be on a nonexclusive basis as the Secretary may determine may be necessary to assure the faithful execution of his authorities and responsibilities under law) the functions vested in him by law relating to gathering, analysis, and dissemination of energy information (as defined in section 796 of title 15) and the Administrator may act in the name of the Secretary for the purpose of obtaining enforcement of such delegated functions.

**(c) Functions of Director of the Office of Energy Information and Analysis**

In addition to, and not in limitation of the functions delegated to the Administrator pursuant to other subsections of this section, there shall be vested in the Administrator, and he shall perform, the functions assigned to the Director of the Office of Energy Information and

Analysis under part B of the Federal Energy Administration Act of 1974 [15 U.S.C. 790 et seq.], and the provisions of sections 53(d) and 59 thereof [15 U.S.C. 790b (d), 790h] shall be applicable to the Administrator in the performance of any function under this chapter.

**(d) Collection or analysis of information and preparation of reports without approval**

The Administrator shall not be required to obtain the approval of any other officer or employee of the Department in connection with the collection or analysis of any information; nor shall the Administrator be required, prior to publication, to obtain the approval of any other officer or employee of the United States with respect to the substance of any statistical or forecasting technical reports which he has prepared in accordance with law.

**(e) Annual audit**

The Energy Information Administration shall be subject to an annual professional audit review of performance as described in section 55 of part B of the Federal Energy Administration Act of 1974 [15 U.S.C. 790d].

**(f) Furnishing information or analysis to any other administration, commission, or office within the Department**

The Administrator shall, upon request, promptly provide any information or analysis in his possession pursuant to this section to any other administration, commission, or office within the Department which such administration, commission, or office determines relates to the functions of such administration, commission, or office.

**(g) Availability of information to public**

Information collected by the Energy Information Administration shall be cataloged and, upon request, any such information shall be promptly made available to the

public in a form and manner easily adaptable for public use, except that this subsection shall not require disclosure of matters exempted from mandatory disclosure by section 552(b) of title 5. The provisions of section 796 (d) of title 15, and section 5916 of this title, shall continue to apply to any information obtained by the Administrator under such provisions.

**(h) Identification and designation of "major energy producing companies"; format for financial report; accounting practices; filing of financial report; annual report of Department; definitions; confidentiality**

(1) (A) In addition to the acquisition, collection, analysis and dissemination of energy information pursuant to this section, the Administrator shall identify and designate "major energy-producing companies" which alone or with their affiliates are involved in one or more lines of commerce in the energy industry so that the energy information collected from such major energy-producing companies shall provide a statistically accurate profile of each line of commerce in the energy industry in the United States.

(B) In fulfilling the requirements of this subsection the Administrator shall—

(i) utilize, to the maximum extent practicable, consistent with the faithful execution of his responsibilities under this chapter, reliable statistical sampling techniques; and

(ii) otherwise given priority to the minimization of the reporting of energy information by small business.

(2) The Administrator shall develop and make effective for use durinng the second full calendar year following August 4, 1977, the format for an energy-producing company financial report. Such report shall

be designed to allow comparison on a uniform and standardized basis among energy-producing companies and shall permit for the energy-related activities of such companies—

(A) an evaluation of company revenues, profits, cash flow, and investments in total, for the energy-related lines of commerce in which such company is engaged and for all significant energy-related functions within such company;

(B) an analysis of the competitive structure of sectors and functional groupings within the energy industry;

(C) the segregation of energy information, including financial information, describing company operations by energy source and geographic area;

(D) the determination of costs associated with exploration, development, production, processing, transportation, and marketing and other significant energy-related functions within such company; and

(E) such other analyses or evaluations as the Administrator finds is necessary to achieve the purposes of this chapter.

(3) The Administrator shall consult with the Chairman of the Securities and Exchange Commission with respect to the development of accounting practices required by the Energy Policy and Conservation Act [42 U.S.C. 6201 et seq.] to be followed by persons engaged in whole or in part in the production of crude oil and natural gas and shall endeavor to assure that the energy-producing company financial report described in paragraph (2) of this subsection, to the extent practicable and consistent with the purposes and provisions of this chapter, is consistent with such accounting practices where applicable.

(4) The Administrator shall require each major energy-producing company to file with the Administrator an energy-producing company financial report on at least an annual basis and may request energy information described in such report on a quarterly basis if he determines that such quarterly report of information will substantially assist in achieving the purposes of this chapter.

(5) A summary of information gathered pursuant to this section, accompanied by such analysis as the Administrator deems appropriate, shall be included in the annual report of the Department required by subsection (a)[1] of section 7267 of this title.

(6) As used in this subsection the term—

(A) "energy-producing company" means a person engaged in:

(i) ownership or control of mineral fuel resources or nonmineral energy resources;

(ii) exploration for, or development of, mineral fuel resources;

(iii) extraction of mineral fuel or nonmineral energy resources;

(iv) refining, milling, or otherwise processing mineral fuels or nonmineral energy resources;

(v) storage of mineral fuels or nonmineral energy resources;

(vi) the generation, transmission, or storage of electrical energy;

(vii) transportation of mineral fuels or nonmineral energy resources by any means whatever; or

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[1] So in original. Section 7267 of this title was not enacted with a subsec. (a).

(viii) wholesale or retail distribution of mineral fuels, nonmineral energy resources or electrical energy;

(B) "energy industry" means all energy-producing companies; and

(C) "person" has the meaning as set forth in section 796 of title 15.

(7) The provisions of section 1905 of title 18 shall apply in accordance with its terms to any information obtained by the Administration pursuant to this subsection.

B.

## FEDERAL ENERGY ADMINISTRATION ACT OF 1974

15 U.S.C. § 772 (1976) provides:

**Administrator's information-gathering power**

**(a) Comprehensive and particular energy information; categorical groupings; monitoring activity and policy guidance**

The Administrator shall collect, assemble, evaluate, and analyze energy information by categorical groupings, established by the Administrator, of sufficient comprehensiveness and particularity to permit fully informed monitoring and policy guidance with respect to the exercise of his functions under this chapter.

**(b) Information and data to Administrator from owners or operators of facilities or business premises engaged in energy matters**

All persons owning or operating facilities or business premises who are engaged in any phase of energy sup-

ply or major energy consumption shall make available to the Administrator such information and periodic reports, records, documents, and other data, relating to the purposes of this chapter, including full identification of all data and projections as to source, time, and methodology of development, as the Administrator may prescribe by regulation or order as necessary or appropriate for the proper exercise of functions under this chapter.

**(c) General or special orders for filing reports or answers in writing to specific questions, surveys, or questionnaires; oath or otherwise; filing period**

The Administrator may require, by general or special orders, any person engaged in any phase of energy supply or major energy consumption to file with the Administrator in such form as he may prescribe, reports or answers in writing to such specific questions, surveys, or questionnaires as may be necessary to enable the administrator to carry out his functions under this chapter. Such reports and answers shall be made under oath, or otherwise, as the Administrator may prescribe, and shall be filed with the Administrator within such reasonable period as he may prescribe.

**(d) Investigations, physical inspections, inventories and samples, copies, and interrogations**

The Administrator, to verify the accuracy of information he has received or otherwise to obtain information necessary to perform his functions under this chapter, is authorized to conduct investigations, and in connection therewith, to conduct, at reasonable times and in a reasonable manner, physical inspections at energy facilities and business premises, to inventory and sample any stock of fuels or energy sources therein, to inspect and copy records, reports, and documents from which energy information has been or is being compiled, and to question such persons as he may deem necessary.

**(e) Subpenas; attendance and testimony of witnesses; production of evidence; enforcement; judicial orders; contempt**

(1) The Administrator, or any of his duly authorized agents, shall have the power to require by subpena the attendance and testimony of witnesses, and the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence which the Administrator is authorized to obtain pursuant to this section.

(2) Any appropriate United States district court may, in case of contumacy or refusal to obey a subpena issued pursuant to this section, issue an order requiring the party to whom such subpena is directed to appear before the Administration and to given testimony touching on the matter in question, or to produce any matter described in paragraph (1) of this subsection, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

**(f) Federal information concerning energy resources on Federal lands; scope of information**

The Administrator shall collect from departments, agencies and instrumentalities of the executive branch of the Government (including independent agencies), and each such department, agency, and instrumentality is authorized and directed to furnish, upon his request, information concerning energy resources on lands owned by the Government of the United States. Such information shall include, but not be limited to, quantities of reserves, current or proposed leasing agreements, environmental considerations, and economic impact analyses.

**(g) Maintenance of records and accounts**

With respect to any person who is subject to any rule, regulation, or order promulgated by the Administrator or

to any provision of law the administration of which is vested in or transferred or delegated to the Administrator, the Administrator may require, by rule, the keeping of such accounts or records as he determines are necessary or appropriate for determining compliance with such rule, regulation, order, or any applicable provision of law.

**(h) Alleviation of reporting burdens for small businesses**

In exercising his authority under this chapter and any other provision of law relating to the collection of energy information, the Administrator shall take into account the size of businesses required to submit reports with the Administrator so as to avoid, to the greatest extent practicable, overly burdensome reporting requirements on small marketers and distributors of petroleum products and other small business concerns required to submit reports to the Administrator.

**(i) Penalties for failure to file information**

Any failure to make information available to the Administrator under subsection (b) of this section, any failure to comply with any general or special order under subsection (c) of this section, or any failure to allow the Administrator to act under subsection (d) of this section shall be subject to the same penalties as any violation of section 796 of this title or any rule, regulation, or order issued under such section.

C.

## ENERGY SUPPLY AND ENVIRONMENTAL COORDINATION ACT OF 1974

15 U.S.C. § 796 (1976 & Supp. II 1978) provides:

**Reporting of energy information**

**(a) Authority of Federal Energy Administrator to request, acquire, and collect energy information; rules and regulations**

For the purpose of assuring that the Federal Energy Administrator, the Congress, the States, and the public have access to and are able to obtain reliable energy information, the Federal Energy Administrator shall request, acquire, and collect such energy information as he determines to be necessary to assist in the formulation of energy policy or to carry out the purposes of this chapter or the Emergency Petroleum Allocation Act of 1973 [15 U.S.C. 751 et seq.]. The Federal Energy Administrator shall promptly promulgate rules pursuant to subsection (b)(1)(A) of this section requiring reports of such information to be submitted to the Federal Energy Administrator at least every ninety calendar days.

**(b) Powers of Federal Energy Administrator in obtaining energy information; verification of accuracy; compliance orders**

(1) In order to obtain energy information for the purpose of carrying out the provisions of subsection (a) of this section, the Federal Energy Administrator is authorized—

(A) to require, by rule, any person who is engaged in the production, processing, refining, transportation by pipeline, or distribution (at other than the retail level) of energy resources to submit reports;

(B) to sign and issue subpenas for the attendance and testimony of witnesses and the production of books, records, papers, and other documents;

(C) to require any person, by general or special order, to submit answers in writing to interrogatories, requests for reports or for other information; and such answers or other submissions shall be made within such reasonable period, and under oath or otherwise, as the Federal Energy Administrator may determine; and

(D) to administer oaths.

(2) For the purpose of verifying the accuracy of any energy information requested, acquired, or collected by the Federal Energy Administrator, the Federal Energy Administrator, or any officer or employer[1] duly designated by him, upon presenting appropriate credentials and a written notice from the Federal Energy Administrator to the owner, operator, or agent in charge, may—

(A) enter, at reasonable times, any business premise or facility; and

(B) inspect, at reasonable times and in a reasonable manner, any such premise or facility, inventory and sample any stock of energy resources therein, and examine and copy books, records, papers, or other documents, relating to any such energy information.

(3) Any United States district court within the jurisdiction of which any inquiry is carried on may, upon petition by the Attorney General at the request of the Federal Energy Administrator, in the case of refusal to obey a subpena or order of the Federal Energy Administrator issued under this section, issue an order requiring compliance therewith; and any failure to obey the order

[1] So in original. Probably should be "employee".

of the court may be punished by the court as a contempt thereof.

**(c) Development of initial report; quarterly reports; accounting practices**

(1) The Federal Energy Administrator shall exercise the authorities granted to him under subsection (b)(1)(A) of this section to develop, within thirty days after June 22, 1974, as full and accurate a measure as is reasonably practicable of—

(A) domestic reserves and production;

(B) imports; and

(C) inventories;

of crude oil, residual fuel oil, refined petroleum products, natural gas, and coal.

(2) For each calendar quarter beginning with the first complete calendar quarter following June 22, 1974, the Federal Energy Administrator shall develop and publish a report containing the following energy information:

(A) Imports of crude oil, residual fuel oil, refined petroleum products (by product), natural gas, and coal, identifying (with respect to each such oil, product, gas, or coal) country of origin, arrival point, quantity received, and the geographic distribution within the United States.

(B) Domestic reserves and production of crude oil, natural gas, and coal.

(C) Refinery activities, showing for each refinery within the United States (i) the amounts of crude oil run by such refinery, (ii) amounts of crude oil allocated to such refinery pursuant to regulations and orders of the Federal Energy Administrator, his delegate pursuant to the Emergency Petroleum

Allocation Act of 1973 [15 U.S.C. 751 et seq.] or any other person authorized by law to issue regulations and orders with respect to the allocation of crude oil, (iii) percentage of refinery capacity utilized, and (iv) amounts of products refined from such crude oil.

(D) Report of inventories, on a national, regional, and State-by-State basis—

(i) of various refined petroleum products, related refiners, refineries, suppliers to refiners, share of market, and allocation fractions;

(ii) of various refined petroleum products, previous quarter deliveries and anticipated three-month available supplies;

(iii) of anticipated monthly supply of refined petroleum products, amount of set-aside for assignment by the State, anticipated State requirements, excess or shortfall of supply, and allocation fraction of base year; and

(iv) of LPG by State and owner: quantities stored, and existing capacities, and previous priorities on types, inventories of suppliers, and changes in supplier inventories.

(3) In order to carry out his responsibilities under subsection (a) of this section, the Federal Energy Administrator shall require, pursuant to subsection (b)(1)(A) of this section, that persons engaged, in whole or in part, in the production of crude oil or natural gas—

(A) keep energy information in accordance with the accounting practices developed pursuant to section 503 of the Energy Policy and Conservation Act [42 U.S.C. 6383], and

(B) submit reports with respect to energy information kept in accordance with such practices.

The Administrator shall file quarterly reports with the President and the Congress compiled from accounts kept in accordance with such section 503 and submitted to the Administrator in accordance with this paragraph. Such reports shall present energy information in the categories specified in subsection (c) of such section 503 to the extent that such information may be compiled from such accounts. Such energy information shall be collected and such quarterly reports made for each calendar quarter which begins 6 months after the date on which the accounting practices developed pursuant to such section 503 are made effective.

**(d) Confidential information**

Upon a showing satisfactory to the Federal Energy Administrator by any person that any energy information obtained under this section from such person would, if made public, divulge methods or processes entitled to protection as trade secrets or other proprietary information of such person, such information, or portion thereof, shall be confidential in accordance with the provisions of section 1905 of title 18; except that such information, or part thereof, shall not be deemed confidential for purposes of disclosure, upon request, to (1) any delegate of the Federal Energy Administrator for the purpose of carrying out this chapter and the Emergency Petroleum Allocation Act of 1973 [15 U.S.C. 751 et seq.], (2) the Attorney General, the Secretary of the Interior, the Federal Trade Commission, the Federal Power Commission, or the General Accounting Office, when necessary to carry out those agencies' duties and responsibilities under this and other statutes, and (3) the Congress, or any committee of Congress upon request of the Chairman.

**(e) Definitions**

As used in this section:

(1) The term "energy information" includes (A) all information in whatever form on (i) fuel reserves, exploration, extraction, and energy resources

(including petrochemical feedstocks) wherever located; (ii) production, distribution, and consumption of energy and fuels wherever carried on; and (B) matters relating to energy and fuels, such as corporate structure and proprietary relationships, costs, prices, capital investment, and assets, and other matters directly related thereto, wherever they exist.

(2) The term "person" means any natural person, corporation, partnership, association, consortium, or any entity organized for a common business purpose, wherever situated, domiciled, or doing business, who directly or through other persons subject to their control does business in any part of the United States.

(3) The term "United States" when used in the geographical sense means the States, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

**(f) Availability of energy information**

Information obtained by the Administration under authority of this chapter shall be available to the public in accordance with the provisions of section 552 of title 5.

**(g) Independent nature of authority to gather energy information**

The authority contained in this section is in addition to, independent of, not limited by, and not in limitation of, any other authority of the Federal Energy Administrator.

## D.

## ANTITRUST CIVIL PROCESS ACT

15 U.S.C. § 1311 (1976) provides:

**Definitions**

For the purposes of this chapter—

(a) The term "antitrust law" includes:

(1) Each provision of law defined as one of the antitrust laws by section 12 of this title; and

(2) Any statute enacted on and after September 19, 1962, by the Congress which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to any restraint upon or monopolization of interstate or foreign trade or commerce;

(b) The term "antitrust order" means any final order, decree, or judgment of any court of the United States, duly entered in any case or proceeding arising under any antitrust law;

(c) The term "antitrust investigation" means any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation or in any activities in preparation for a merger, acquisition, joint venture, or similar transaction, which, if consummated, may result in an antitrust violation;

(d) The term "antitrust violation" means any act or omission in violation of any antitrust law or any antitrust order;

(e) The term "antitrust investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any antitrust law;

(f) The term "person" means any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of State law;

(g) The term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document; and

(h) The term "custodian" means the custodian or any deputy custodian designated under section 1313 (a) of this title.

15 U.S.C. § 1312 (1976) provides:

**Civil investigative demands**

**(a) Issuance; service; production of material; testimony**

Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to a civil antitrust investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to answer in writing written interrogatories, to give oral testimony concerning documentary material or information, or to furnish any combination of such material, answers, or testimony.

**(b) Contents**

Each such demand shall—

(1) state the nature of—

(A) the conduct constituting the alleged antitrust violation, or

(B) the activities in preparation for a merger, acquisition, joint venture, or similar transaction, which, if consummated, may result in an antitrust violation,

which are under investigation and the provision of law applicable thereto;

(2) if is is a demand for production of documentary material—

(A) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(B) prescribe a return date or dates which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(C) identify the custodian to whom such material shall be made available; or

(3) if it is a demand for answers to written interrogatories—

(A) propound with definitenes and certainty the written interrogatories to be answered;

(B) prescribe a date or dates at which time answers to written interrogatories shall be submitted; and

(C) identify the custodian to whom such answers shall be submitted; or

(4) if it is a demand for the giving of oral testimony—

(A) prescribe a date, time, and place at which oral testimony shall be commenced; and

(B) identify an antitrust investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted.

**(c) Protected material or information**

No such demand shall require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony, if such material, answers, or testimony would be protected from disclosure under—

(1) the standards applicable to subpenas or subpenas duces tecum issued by a court of the United States in aid of a grand jury investigation, or

(2) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this chapter.

**(d) Service; jurisdiction**

(1) Any such demand may be served by any antitrust investigator, or by any United States marshal or deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) any such demand or any petition filed under section 1314 of this title may be served upon any person who is not to be found within the territorial jurisdiction

of any court of the United States, in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this chapter by such person that such court would have if such person were personally within the jurisdiction of such court.

**(e) Service upon legal entities and natural persons**

(1) Service of any such demand or of any petition filed under section 1314 of this title may be made upon a partnership, corporation, association, or other legal entity by—

(A) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such partnership, corporation association, or entity;

(B) delivering a duly executed copy thereof to the principal office or place of business of the partnership, corporation, association, or entity to be served; or

(C) depositing such copy in the United States mails, by registered or certified mail, return receipt requested, duly addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Service of any such demand or of any petition filed under section 1314 of this title may be made upon any natural person by—

(A) delivering a duly executed copy thereof to the person to be served; or

(B) depositing such copy in the United States mails by registered or certified mail, return receipt requested, duly addressed to such person at his residence or principal office or place of business.

**(f) Proof of service**

A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

**(g) Sworn certificates**

The production of documentary material in response to a demand served pursuant to this section shall be made under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances relating to such production, to the effect that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.

**(h) Interrogatories**

Each interrogatory in a demand served pursuant to this section shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for the objection shall be stated in lieu of an answer, and it shall be submitted under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is

directed or, if not a natural person, by a person or persons responsible for answering each interrogatory, to the effect that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted.

**(i) Oral examinations**

(1) The examination of any person pursuant to a demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian.

(2) The antitrust investigator or investigators conducting the examination shall exclude from the place where the examination is held all other persons except the person being examined, his counsel, the officer before whom the testimony is to be taken, and any stenographer taking such testimony. The provisions of section 30 of this title shall not apply to such examinations.

(3) The oral testimony of any person taken pursuant to a demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the antitrust investigator conducting the examination and such person.

(4) When the testimony is fully transcribed, the antitrust investigator or the officer shall afford the witness

(who may be accompanied by counsel) a reasonable opportunity to examine the transcript; and the transcript shall be read to or by the witness, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the antitrust investigator with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within thirty days of his being afforded a reasonable opportunity to examine it, the officer or the antitrust investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reason, if any, given therefor.

(5) The officer shall certify on the transcript that the witness was duly sworn by him and that the transcript is a true record of the testimony given by the witness, and the officer or antitrust investigator shall promptly deliver it or send it by registered or certified mail to the custodian.

(6) Upon payment of reasonable charges therefor, the antitrust investigator shall furnish a copy of the transcript to the witness only, except that the Assistant Attorney General in charge of the Antitrust Division may for good cause limit such witness to inspection of the official transcript of his testimony.

(7) (A) Any person compelled to appear under a demand for oral testimony pursuant to this section may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, either upon the request of such person or upon counsel's own initiative, with respect to any question asked of such person. Such person or counsel may object on the record to any ques-

tion, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may properly be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person shall not otherwise object to or refuse to answer any question, and shall not by himself or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, the antitrust investigator conducting the examination may petition the district court of the United States pursuant to section 1314 of this title for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of Part V of title 18.

(8) Any person appearing for oral examination pursuant to a demand served under this section shall be entitled to the same fees and mileage which are paid to witnesses in the district courts of the United States.

15 U.S.C. § 1313 (1976) provides:

**Custodian of documents, answers and transcripts**

**(a) Designation**

The Assistant Attorney General in charge of the Antitrust Division of the Department of Justice shall designate an antitrust investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this chapter, and such additional antitrust investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

**(b) Production of materials**

Any person, upon whom any demand under section 1312 of this title for the production of documentary material has been duly served, shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person (or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to section 1314(d) of this title) on the return date specified in such demand (or on such later date as such custodian may prescribe in writing). Such person may upon written agreement between such person and the custodian substitute copies for originals of all or any part of such material.

**(c) Responsibility for materials; disclosure**

(1) The custodian to whom any documentary material, answers to interrogatories, or transcripts of oral testimony are delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return of documentary material, pursuant to this chapter.

(2) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any duly authorized official or employee of the Department of Justice under regulations which shall be promulgated by the Attorney General. Notwithstanding paragraph (3) of this subsection, such material, answers, and transcripts may be used by any such official or employee in connection with the taking of oral testimony pursuant to this chapter.

(3) Except as otherwise provided in this section, while in the possession of the custodian, no documentary material, answers to interrogatories, or transcripts of oral

testimony, or copies thereof, so produced shall be available for examination, without the consent of the person who produced such material, answers, or transcripts, by any individual other than a duly authorized official or employee of the Department of Justice. Nothing in this section is intended to prevent disclosure to either body of the Congress or to any authorized committee or subcommittee thereof.

(4) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe, (A) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by any duly authorized representative of such person, and (B) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or his counsel.

**(d) Use of investigative files**

(1) Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal administrative or regulatory agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case, grand jury, or proceeding as such attorney determines to be required. Upon the completion of any such case, grand jury, or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through the introduction thereof into the record of such case or proceeding.

(2) The custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony

may deliver to the Federal Trade Commission, in response to a written request, copies of such material, answers, or transcripts for use in connection with an investigation or proceeding under the Commission's jurisdiction. Such material, answers, or transcripts may only be used by the Commission in such manner and subject to such conditions as apply to the Department of Justice under this chapter.

**(e) Return of material to producer**

If any documentary material has been produced in the course of any antitrust investigation by any person pursuant to a demand under this chapter and—

(1) any case or proceeding before any court or grand jury arising out of such investigation, or any proceeding before any Federal administrative or regulatory agency involving such material, has been completed, or

(2) no case or proceeding, in which such material may be used, has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies thereof furnished to the custodian pursuant to subsection (b) of this section or made by the Department of Justice pursuant to subsection (c) of this section) which has not passed into the control of any court, grand jury, or agency through introduction thereof into the record of such case or proceeding.

**(f) Appointment of successor custodians**

In the event of the death, disability, or separation from service in the Department of Justice of the cus-

todian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced under any demand issued pursuant to this chapter, or the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Assistant Attorney General in charge of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as custodian of such material, answers, or transcripts, and (2) transmit in writing to the person who produced such material, answers, or testimony notice as to the identity and address of the successor so designated. Any successor designated under this subsection shall have with regard to such material, answers, or transcripts all duties and responsibilities imposed by this chapter upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred prior to his designation.

15 U.S.C. § 1314 (1976) provides:

**Judicial proceedings**

**(a) Petition for enforcement; venue**

Whenever any person fails to comply with any civil investigative demand duly served upon him under section 1312 of this title or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General, through such officers or attorneys as he may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this chapter.

**(b) Petition for order modifying or setting aside demand; time for petition; suspension of time allowed for compliance with demand during pendency of petition; grounds for relief**

Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, or within such period exceeding twenty days after service or in excess of such return date as may be prescribed in writing, subsequent to service, by any antitrust investigator named in the demand, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such antitrust investigator a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court, except that such person shall comply with any portions of the demand not sought to be modified or set aside. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this chapter, or upon any constitutional or other legal right or privilege of such person.

**(c) Petition for order requiring performance by custodian of duties; venue**

At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories delivered, or transcripts of oral testimony given by any person in compliance D with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring

the performance by such custodian of any duty imposed upon him by this chapter.

**(d) Jurisdiction; appeal; contempts**

Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this chapter. Any final order so entered shall be subject to appeal pursuant to section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt thereof.

**(e) Applicability of Federal Rules of Civil Procedure**

To the extent that such rules may have application and are not inconsistent with the provisions of this chapter, the Federal Rules of Civil Procedure shall apply to any petition under this chapter.

**(f) Disclosure exemption**

Any documentary material, answers to written interrogatories, or transcripts of oral testimony provided pursuant to any demand issued under this chapter shall be exempt from disclosure under section 552 of title 5.

E.

EXCERPTS FROM TESTIMONY OF JOHN H. SHENEFIELD DURING *Hearings On "Oversight of Department of Justice Antitrust Division Authorization of Funds For Fiscal Year 1980" Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess., March 21, 1979, pages 40-46

MR. SHENEFIELD If we could somehow relieve ourselves of responsibilities and retain some sources that would, of course, be highly desirable from the point of view of antitrust. But I don't think of that as being very likely.

I think we do a good job, and these are complementary concerns, such as our work for the Federal Trade Commission. These are times that we can work extremely effectively because we know what it is that originated these in foregoing concerns.

MR. RODINO Mr. Shenefield, do you find it difficult to be able to get from other federal agencies the kind of assistance or information that you might need in order to be able to pursue your responsibilities?

MR. SHENEFIELD In general, no. The one frustration in that area that I have . . .

MR. RODINO Can you specifically identify any agencies that might withhold information that you think ought to come within the jurisdiction or ambiance of your decision?

MR. SHENEFIELD Well, I can. One frustration I had was in the energy area. Despite now almost a year and nine months of our best efforts, we are still not in agreement with the EIA on access to the so-called FRS data, without which we are just simply going to find it very difficult to carry out our responsibilities in assessing competitive structure, of the energy area. We have made our concerns known over months. It has been a very long time.

MR. RODINO What is the reason for their being unable to get together with you and give you this information?

MR. SHENEFIELD They recognize our concern. This concern is very much in the nature of a concensus con-

cern. They are simply afraid if oil companies and others are aware that we have access to information that the companies are voluntarily supplying, that those companies will become much less cooperative than they are now, and that they will be tied up in years of litigation trying to move this program forward. I thought they were very near agreement last fall, when we suggested a variety of fail safe devices giving notice to the companies so that they could go to court and the like. But all of a sudden that fell apart and I have had a most discouraging experience in recent weeks, where we have simply been refused information on the ground it would not comport with the companies understanding of safeguarding information. That was in the coal area.

We are required, as you know, to render reports to the Congress, to the President, to make judgments on the competitive implications of outer continental shelf leases. We simply can't do that without data, and we do not have the legal authority to step back from that process and issue discovery, compulsory discovery requests, because our power there has to be in connection with—that is, limited to the specific enforcement investigations and not the general advisory function. So it is very hard to see how we can be effective.

MR. RODINO Well, it would appear to me that this information is so vital. I suppose the reasons for the provisions for such information is to assume that there aren't antitrust violations and that there is free competitive market, especially in that area. And, of course, we recognize the grave problems that there have been because those have been the need to assure that we do have energy, and they don't like any interruptions I suppose. But I wonder there has to be this apprehension on the part of DOE, when all you are doing is seeking to do your job in that area, that seeks to assure a free competitive market. I'm not asking you to look into their minds, but

it seems to me that all you are asking for is cooperation, to be able to do a job in an area when Pres. Carter said there is a need. There is a need to assure that there is enforcement of our antitrust laws, and we have heard so much about violations or illegal violations in this area.

MR. SHENEFIELD Well, in part of the original energy message from the President in the late spring, as I recall it, of 1977, it clearly specifies that in place of legislative divestiture, there was a need to get the antitrust enforcement agencies to get access to the relative information, and that's what this program is all about. And here we are, I confess, two years later and we still don't have the information.

MR. RODINO I would like to some time explore that focus with, in the interest of providing the committee with more of what you have been doing in that area, how far you have been going, and what the actual hold-up has been. I think there may be a need for us to have to inquire and see why, because frankly, it bothers me that there's so much that needs to be done in this area of enforcement, and especially recognizing that we have, I think, given the people the kind of go-ahead without trying to throw monkey-wrenches in the way, but nonetheless hoping too, that there would be cooperation in providing us with the kind of information to be the watchdogs. You know, the people who are going to be subjected to the terrible consequences of antitrust violations and especially in this particular area.

MR. SHENEFIELD I agree with that sentiment.

MR. RODINO I know we withheld a lot of effort on the floor of the House when the whole problem was being debated. We withheld many, many arguments that we might have proposed as to whether or not we should be more careful, more stringent, a little more, I guess, aggressive in the area of assuring that there wouldn't

be a misuse when authority was being given in this area of their time.

We talked about, you know, the possibilities of having companies do whatever was necessary to promote the kind of cooperative effort to insure that we get energy without violating the law, conspiring against the public at large. You know, it causes me to wonder whether or not sometimes allowing all of these people to just be able to proceed almost on a voluntary is the best way to go.

MR. SHENEFIELD We don't know the answer to that question until we have the data. I hope the next time we talk about it, I can be more optimistic, but I'm not confident at all.

REP. HARRIS Mr. Chairman, can we yield on that point? Do you have the statutory power to subpoena here, and has that been utilized, or should it be utilized?

MR. SHENEFIELD No, we do not have statutory power of subpoena for information furnished to another government agency under confidentiality agreements. There are two relevant statutes that the Dept. of Energy collects information under.

One would appear to give general access to information. The other does not. The judgment that the Dept. of Energy has been utilizing to collect information under is the second of the two statutes, so that we are having to make both legal arguments and other kinds of arguments, and we simply haven't been able to persuade them thus far.

REP. HARRIS Not able to persuade the Dept. of Energy?

REP. HARRIS I'm sorry, but I find that incredible.

MR. SHENEFIELD That's correct.

The Dept. of Energy wants to make sure it accumulates information in a way that you can't look at?

MR. SHENEFIELD They collect it under a statute different from the one that gives the Attorney General fairly clear access to that information. And that was simply an option that was given to them by Congress, and they have availed themselves of it.

REP. HARRIS Maybe Mr. Schlesinger would answer the question of why that is. I think it seems to be a remarkable lack of cooperation between two government agencies.

MR. SHENEFIELD I think the problem is really more directly in the Energy Information Agency, which is a semi-independent concern of the Dept. of Energy. There you have people who are very concerned about the whole program breaking down, because nobody will give them information.

But our concern is that it is very useless to us to have information somewhere we can't see.

REP. HARRIS That's an excellent point.

Thank you, Mr. Chairman.

## APPENDIX E

## LIST OF SUBSIDIARIES AND AFFILIATES OF PETITIONER CORPORATIONS

A. *Subsidiaries and Affiliates of Petitioner Shell Oil Company*

Basin Pipe Line System
Bullenbay Marine Services N.V.
Butte Pipe Line Company
Capline System
Capwood Pipe Line System
Crown-Shell Baytown Feeder Line System
Curacao Oil Terminal N.V.
Dixie Pipeline Company
East Texas Salt Water Disposal Company
Explorer Pipeline Company
Gravcap, Inc.
Inland Corporation
LOCAP, Inc.
LOOP, Inc.
MESBIC Financial Corporation of Houston
Oil Companies Institute for Marine Pollution Compensation Limited
Olympic Pipe Line Company
Ozark Pipe Line System
Penn Central Corporation
Plantation Pipe Line Company
Rancho Pipe Line System
Seadock, Inc.
SES, Incorporated
Ship Shoal Pipe Line System
Thums Long Beach Company
West Shore Pipe Line Company
WIDC (Wyoming Industrial Development Corporation)
Wolverine Pipe Line Company

B. *Subsidiaries and Affiliates of Petitioner Texaco Inc.*

Airport Refueling Services S.p.A.
Aktiebolaget Svensk Petroleumlagring
Alberta Products Pipe Line Ltd.
Arabian American Oil Company
Associated Octel Company Limited, The
Aviation Fuel Services Ltd.
Badger Pipe Line Company
Bayonne Industries, Inc.
Bergemann KG
Boral Limited
Caltex Petroleum S.A.F.
Canyon Reef Carriers, Inc.
Central African Petroleum Refineries (Private) Ltd.
Cia. Refinadora Petrolera Santo Domingo, Inc.
Colonial Pipeline Company
Coltexo Corporation
Deutsche Transalpine Olleitung GmbH
Dixie Pipeline Company
Drivmedelscentralen A.B.
East African Oil Refineries Limited
Explorer Pipeline Company
Felix Oil Company
Forenade Svenska Oljeimportorers AB
Frevlig A.G.
Gas Natural Colombiano S.A.
Ghana Bunkering Services Limited
H.C. Sleigh Limited
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Irish Refining Company Limited
Kaw Pipe Line Company
Laurel Pipe Line Company
LOCAP Inc.
LOOP Inc.
Maghreb Gaz S.A.
Mainline Pipelines Limited

Milan Airport Refueling Services, S.p.A. (MARS)
Mitsui-Texaco Chemicals Co. Ltd.
Montreal Pipe Line Company Limited
Ndola Oil Storage Company Limited
New Zealand Refining Company Limited, The
N.V. Rotterdam Rijn Pijpleiding Maatschappij
Oberrheinische Mineralolwerke G.m.b.H.
Olympic Pipe Line Company
Pakistan Refinery Limited
Pars Investment Corporation
Pipelines of Puerto Rico, Inc., The
Portland Pipe Line Corporation
Raffinerie du Sud-Ouest S.A.
Refinery Services Company S.A.
Rheem del Ecuador C.A.
Rhein-Mein Rohrleitungstransportgesellschaft m.b.H.
Saudi International Petroleum Carrier Ltd.
Sierra Leone Petroleum Refining Company Limited, The
Skandinaviska Raffinaderi Aktiebolaget Scanraff
Societa per Azioni Raffineria Padana Olii Minerali (SARPOM)
Societe Africaine de Raffinage S.A. (SAR)
Societe Anonyme de la Raffinerie des Antilles (SARA)
Societe Camerounaise d'Entreposage (SCE)
Societe Dakaroise d'Entreposage S.A. (SDE)
Societe De Manutention Des Carburants Aviation Dakar-Yoff (SMACADY)
Societe D'Entreposage de Bobo-Dioulasso
Societe d'Entreposage de San Pedro S.A. (SESP)
Societe d'Entreposage Petrolier au Burundi S.A.R.L. (SEPBURUNDI)
Societe Gabonaise d'Entreposage de Produits Petroliers S.A. (SGEPP)
Societe Gabonaise de Raffinage (SOGARA)
Societe Italiana per l'Oleodotto Transalpino S.p.A.

Societe Ivoirienne de Raffinage S.A. (SIR)
Societe Malgache de Raffinage
Societe Reunionnaise d'Entreposage (S.R.E.)
Societe Tchadienne d'Entreposage de Produits Petroliers S.A. (STEPP)
Societe Togolaise d'Entreposage S.A. (STE)
South Africa Oil Refining (Proprietary) Limited
Steag AG
Svensk Petroleum Forvaltning Aktiebolag
Tankanlage AG Ruemlang (TAR)
Texaco Mexicana, S.A.
Texas-New Mexico Pipe Line Company
THUMS Long Beach Company
Transalpine Finance Holdings S.A.
Transalpine Olleitung in Osterreich GmbH
Trans Northern Pipe Line Company
Trinidad Asphalt Holdings Limited
Trinidad Northern Areas Limited
Trinmar Limited
Trintovac Developments Limited
United Kingdom Oil Pipelines Limited
Unterflur Betankungsanlage A.G. (UBAG)
Venezuela Gulf Refining Co.
West Australian Natural Gas Pty. Limited
West Australian Petroleum Pty. Limited
West Shore Pipe Line Company
Wolverine Pipe Line Company
Wyco Pipe Line Company
Zaire Services des Entreprises Petrolieres (Zaire S.E.P.)

C. *Subsidiaries and Affiliates of Petitioner Phillips Petroleum Company*

Acurex Corporation
Aero Oil Company
Alyeska Enterprises, Inc.
Alyeska Pipeline Service Company

Arctic LNG Transportation Company
Bonny LNG Ltd. (P.P. Worldwide Gas Ltd.)
Bruin Carbon Dioxide Sales Corporation
Calatrava Empress Para la Industria
Petroquimica, S.A.
Canada Western Cordage Co., Ltd.
Canyon Reef Carriers Inc.
Cochin Refineries Ltd.
Colonial Pipeline Company
Compagnie Francaise du Carbon Black S.A.
Dixie Pipeline Company
Everglades Pipe Line Company
Explorer Pipeline Company
Gardner Cryogenics Europe N.V.
Insurance and Reinsurance Brokers (Bermuda) Ltd.
Iranian Marine International Oil Company
Kaw Pipe Line Company
Kenai LNG Corporation
LeeFac, Inc.
Negromex S.A.
Nordisk Philblack AB
Norland GmbH
Norpipe A/S
Norpipe Petroleum U.K. Ltd.
Norsea Gas A/S
Norsea Gas GmbH
Norsea Pipeline Ltd.
Papago Chemicals, Inc.
Petrochim
Phillips Carbon Black Company (Pty.) Ltd.
Phillips Carbon Black Italiana S.p.A.
Phillips Carbon Black Limited
Phillips Gas Supply Corporation
Phillips Imperial Petroleum Limited
Phillips Pacific Chemical Company
Phillips Petroleum Singapore Chemicals
(Private) Limited

Philmac Oils Limited
Plasticos Vanguardia S.A.
Polar LNG Shipping Corporation
Polyolefins
Powder River Corporation
Renolit Fertighaus GmbH
Seadock, Inc.
Seaway Pipeline, Inc.
Sevalco (Holdings) Limited
Societe De Developpement Des Polyolefins
Transatlantic Reinsurance
Trenwick Ltd.
Western Desert Operating Petroleum Company
White River Shale Oil Corporation

D. *Subsidiaries and Affiliates of Petitioner Coastal States Gas Corporation (Coastal Corporation)*

Geogas Enterprise S.A.
Jayhawk Pipe Line Corporation
Productos Furanicos, S.A. de C.V.

E. *Subsidiaries and Affilates of Petitioner Gulf Oil Corporation*

Afran Bahamas Ltd. Marine Dept.
Alberta Products Pipe Line Ltd.
Allied-General Nuclear Services
American Heavy Lift Shipping Company
Asia Polymer Corporation
A/S Jargul
A/S Jargul and Co. K/S
Australian Gulf Oil Company
Balinesian Gulf Oil Ltd.
Britama Tankers Limited
Cabinda Gulf Oil Company
Canada Systems Group (EST) Limited
Carboquimica, S.A.

China Gulf Oil Company, Ltd.
China Gulf Plastics Corporation
Colonial Pipeline Company
Compania Petrolera Aguarico S.A.
Compagnie D'Investments Pour Les Combustibles
De Reacteurs a Haute Temp
Coser S.A.
Eastern Gulf Oil Company, Ltd.
Eastern Venezuela Gas Transport Company
Ethylene Pijpleiding Maatschappij (Belgium) S.A.
Ethylene Pijpleiding Maatschappij
(Nederland) B.V.
Explorer Pipeline Company
Gaelic Oil Co. Ltd.
G & C Realty Limited
General Atomic Company
General Atomic Europe—G.m.b.H.—Zurich
Gulf Canada, Ltd.
Gulf-Dravo Systems Corporation
Gulf Ecuatoriana de Petroleo, S.A.
Gulf Italia Production Co. S.p.A.
Gulf Italiana SpA
Gulf Oil A/S
Gulf Oil (Belgium) SA
Gulf Oil Chemicals Company Asia Limited
Gulf Oil Company (Nigeria) Ltd.
Gulf Oil Company of Gabon
Gulf Oil Company (Portugal) Limited
Gulf Oil Company South Asia
Gulf Oil Egypt, Ltd.
Gulf Oil (Great Britain) Ltd.
Gulf Oil (Ireland) Ltd.
Gulf Oil (Luxembourg) S.A.
Gulf Oil Pakistan Ltd.
Gulf Oil Refining Ltd.
Gulf Oil Sales, Inc.
Gulf Oil (Switzerland)

Gulf Oil Trading GmbH
Gulf Oil Trading Investments Limited
Gulf Oil Zaire S.a.R.L.
Gulf Oman Petroleum Ltd.
Gulf-Preload Structures Inc.
Gulf Supply and Distribution Co. Ltd.
Gulf (U.K.) Offshore Investments Limited
Harshaw Cabo & Cia, S.A.
Harshaw Chemie S.a.R.L.
Harshaw Galvanotechnia S.A.
Harshaw Quimics Ltda.
Hochtemperatur Reaktorbau G.m.b.H.
Hutchinson Island Limited Partnership
Ico Pinturas, S.A.
Industrias Vencedor S.A.
Interquimics S.A.
INSCO Holding and Finance Company N.V.
INSCO Limited
Java Gulf Ltd.
Keydril Ltd.
Keydril (Nigeria) Ltd.
Key International Drilling Co. Limited
Key Perfuracoes Maritimas, Ltd.
Korea Oil Corporation
Kupan Emirates Company Ltd.
Kupan Financial Company (Rotterdam)
B.V.—Minerals Branch
Kuwait Oil Company Limited
Laurel Pipe Line Company
London Oil Refining Company Limited
Mid-Atlantic Chemical Corp. S.A.
Midcaribbean Investments Ltd.
Midwest Carbide Corporation
Millmaster Onyx (Canada) Ltd.
Millmaster Onyx G.m.b.H.
Montreal Pipe Line Company Limited
Mozambique Gulf Oil Company

Okinawa Sekiyu Seisei Company, Ltd.
Okinawa Terminals Co., Ltd.
Oklahoma Nitrogen Company
Panindustrial, S.A.
Peace Pipe Line, Ltd.
Pembroke Craking Company
Permapint, S.A.
Petroleo Gulf do Brazil Limitada
Petroleos Gulf de Guatemala, S.A.
Plaschem International Company (Hong Kong) Ltd.
Plastigama, S.A.
Productos Quimicos Somox, Ltda.
Project Baltic
Propet Company Ltd.
Raffinerie de Cressier S.A.
Rimbey Pipe Line Co., Limited
Rio Blanco Oil Shale Partnership
Sarni S.p.A.
Silvertown Lubricants Limited
Sociedad Anonima Espanola de Lubrificantes
Societe de Combustible Pour Reacteurs
a Haute Temp.
South Pacific Gulf Oil Company
Spanish Gulf Oil Company
Spencer Quimica Mexicana S.A. de C.V.
Sultron Ltd.
Sulzer General Atomic Waermetauscher
Taita Chemical Corporation
Trans Northern Pipe Line Company
Venezuela Gulf Refining Company
West Texas Gulf Pipe Line Company
Western G.M.C. Pontiac Buick Ltd.

F. *Subsidiaries and Affiliates of Petitioner Mobil Corporation*

Ankara Gaz Satis Anonim Sirketi
Arabian International Maritime Company Limited

ATAS—Andolu Tasfiyehanesi Anonim Sirketi
Bayerische Mineral-Industrie A.G.
Benoil S.A.
Cercera S.A.
Colombianos Distribuidores de Combustibles, S.A. (CODI)
Compagnie Immobiliere (Comimmo)
Compagnie Regionale de Distribution de Produits Petroliers-C.O.R.E. Dis.
Constructora Calle 70, S.A.
CORCOP
CRCP
Emoleum (Asphalts) Limited
Etablissements Pierre Boiron
Faavang Autoverksted A/S
Fuel Colmerauer
Henschker Mineraloelvertriebs GmbH
Imperial Gas Co. of P.R., Inc.
Istabul Petrol ve Makine Yaglari Limited Sirketi
Les Nouveaux Comptoirs Petroliers
Mei Foo Investments Limited
Mobil Ami, S.A.
Mobil Beteiligungs—Und Vertriebsgesellschaft MbH
Mobil Chemie Belgie N.V.
Mobil Chemie Belge S.A.
Mobil-Comercio, Industria e Servicos Ltda.
Mobil Gaz-Mobil Petrol Gazlari. Anonim Sirketi
Mobil Investments A.G.
Mobil Oil Angola, SARL
Mobil Oil Cameroun
Mobil Oil Cote d'Ivoire
Mobil Oil Dahomey
Mobil Oil Djibouti, S.A.
Mobil Oil Francaise
Mobil Oil Gabon
Mobil Oil Ghana Limited

Mobil Oil Haute Volta
Mobil Oil Holdings S.A.
Mobil Oil Mali
Mobil Oil Mauritanie
Mobil Oil Niger
Mobil Oil Nigeria Limited
Mobil Oil Nord-Africaine
Mobil Oil Philippines Inc.
Mobil Oil Portuguesa, S.A.R.L.
Mobil Oil Rwanda-Burundi (S.A.R.L.)
Mobil Oil (Switzerland)
Mobil Oil Tchad
Mobil Oil Togo
Mobil Oil Turk Anonim Sirketi
Mobil Quimica Ltda.
Mobilrex
Mobil Tyco Solar Energy Corporation
Petroleum Refineries (Australia) Proprietary Limited
S.A. Mas & Cie
SARL Comptoir Rhodanien des Combustibles
SARL Garage Pineau
R. Simonnet & CIE
Sociedade Portugal Marrocos SARL
Societe Camerounaise Equatoriale De Fabrication De Lubrifiants "S.C.E.F.L."
Societe Civile Immobiliere du 10 Bd. de la Republique A la Garenne-Colombes
Societe de Materiaux d'Etancheite Pour Les Entreprises (Meple)
Societe Francaise Stoner-Mudge
Societe Lemetayer
Societe Nouvelle Raffinerie Meridionale De Ceresines (RMC)
SOMODIP
Sonarep (South Africa) (Proprietary) Limited
Station-Service Lunes

Toulouse—Distribution Produits Petroliers
Zaire Mobil Oil

G. *Subsidaries and Affiliates of Petitioner Union Oil Company of California*

Ace Gas, Inc.
Adobe Canyon
Arapahoe Pipe Line Company
Badger Pipeline Co.
Brea Agricultural Service, Inc.
Chicap Pipeline Co.
Colonial Pipeline Co.
Consumers Service Company
Cook Inlet Pipeline Co.
Everglades Pipeline Co.
Gravcap Inc.
Gravity Adjustment, Inc.
Inland Corporation
International Speedway
LOOP, Inc.
Los Angeles Oil Company, The
Miami Valley Corporation
Mid-County Chemical Co.
Midwest PMS, Inc.
Oil Shipper Service, Inc.
Ouachita Fertilizer Company, Inc.
Pima Mining Co.
Platts Pipeline Co.
P-M-S West, Inc.
Remcoa
Sepulveda Oil & Gas Company
Southcap Pipe Line Company
South Sashatchewan Pipeline Co.
Superior Deshler Co.
Tecumseh Pipeline Co.
Van Salt Water Disposal Company
West Texas Gulf Pipeline Co.

West Shore Pipeline Co.
Wolverine Pipeline Co.

H. *Subsidiaries and Affiliates of Petitioner Continental Oil Company (Conoco Inc.)*

Alberta Gas Truck Line Company, Ltd.
Associated Petroleum Terminals
Aurora Pipe Line Company
Big Sky of Montana Realty, Inc.
Bishop Coal Company
Calcasieu Chemical Corporation
Cansulex Ltd.
Carbon Black Espanola, S.A.
Cardinal River Coals, Ltd.
Chieftain Mac Gas Ltd.
Cit-Con Oil Corporation
Cliffe Storage, Ltd.
Colonial Pipeline
Columbian Continental Europa, S.p.A.
Compagnie Francaise du Carbon Black, S.A.
Conch International Methane, Ltd.
Condea Chemie, GmbH
Conoco Exploration, Ltd.
Conoco Limited
Continental Carbon Australia Pty. Limited
Continental Carbon Company
Continental Columbian Carbon Nederland, B.V.
Continex Francaise S.A.R.L.
Continex Nederland B.V.
Continex S.r.l.
Contochu, Inc.
Crude Oil Terminals, Ltd.
Dixie Pipeline
Explorer Pipeline Company
Felix Oil Company
Harmar Coal Co.
Hudbay Exploration, Inc.

Hudbay Mining Limited
Hudbay Oil (Australia) Ltd.
Hudbay Oil Company of Denmark A/S
Hudbay Oil Company of Denmark Ltd.
Hudbay Oil (Egypt) Ltd.
Hudbay Oil (Indonesia) Ltd.
Hudbay Oil International Ltd.
Hudbay Oil (Ireland) Ltd.
Hudbay Oil (Malacca Strait) Ltd.
Hudbay Oil (Netherlands) Ltd.
Hudbay Oil (Spain) Ltd.
Hudbay Oil (Turkey) Ltd.
Hudbay Uranium Ltd.
Hudson's Bay Oil and Gas Company Limited
Hudson's Bay Oil and Gas Company (U.K.) Limited
Humber Oil Terminals Trustee, Ltd.
Iricon Agency, Ltd.
Itmann Coal Co.
Kettleman North Dome Association
K/s Statfjord Transport A.S. & Co.
Lake Charles Pipe Line
Long Beach Oil Development Company
Lucky Continental Carbon Co., Ltd.
Maritime Protection A/S
Mathies Coal Co.
Nippon Aluminum Alkyes, Ltd.
Nissan-Conoco Corporation
Norske Hudbay A/S
Northward Developments, Ltd.
Oil Shippers Service, Inc.
OMW (Karlsruhe)
Pasa Petroquinica Argentina, S.A.
Peace Pipe Line, Ltd.
Petrocokes, Ltd.
Petroleum Terminals, Inc.
Petroleum Storage, Ltd.
Petroquimica Espanola, S.A. (Petresa)

Pioneer Pipe Line Company
Platte Pipe Line
Rangeland Pipe Line Company Limited
Rimbey Pipeline Co., Ltd.
Seadock, Inc.
Seaway Pipeline, Inc.
SEERAT
Selang Ltd.
Smiley Gas Conservation Ltd.
Southern Facilities, Inc.
Standard Shale Products Company
Statfjord Transport A.S.
Sultran Ltd.
Syncrude Canada, Ltd.
T.A.L. (Austria)
T.A.L. (Germany)
T.A.L. (Italy)
T.A.L. (Luxembourg)
Tidelands Royalty Trust
Toyo Continental Carbon, Ltd.
Warwickshire Oil Storage, Ltd.
West Shore Pipe Line
Yellowstone Pipe Line

No. 80-924

# In the Supreme Court of the United States

OCTOBER TERM, 1980

SHELL OIL COMPANY, ET AL., PETITIONERS

*v.*

DEPARTMENT OF ENERGY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

WADE H. MCCREE, JR.
*Solicitor General*

THOMAS S. MARTIN
*Acting Assistant Attorney General*

MICHAEL KIMMEL
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Energy Information Administration's requirement that energy-producing companies submit financial reports is authorized by law.

2. Whether the Energy Information Administration has authority to cooperate with antitrust enforcement agencies in developing and utilizing its financial reporting system.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 631 F. 2d 231. The opinion of the district court (Pet. App. B) is reported at 477 F. Supp. 413.

## JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on September 8, 1980. The petition for a writ of certiorari was filed on Monday, December 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES INVOLVED

Section 12(f) of the Federal Energy Administration Act of 1974, 15 U.S.C. 771(f), provides in pertinent part:

> * * * The Comptroller General may not disclose to the public any information which concerns or relates to a trade secret or other matter referred to in section 1905 of Title 18, except that such information shall be disclosed by the Comptroller General or the Administrator [of the Federal Energy Administration], in a manner designed to preserve its confidentiality—
>
> > (1) to other Federal Government departments, agencies, and officials for official use upon request[.]

Section 52(a) of the Federal Energy Administration Act of 1974, 15 U.S.C. (Supp. III) 790a(a), provides in pertinent part:

> It shall be the duty of the Director [now the Administrator of the Federal Energy Administration] to establish a National Energy Information System * * *. The System shall contain such information as is required to provide a description of and facilitate analysis of energy supply and consumption within and

affecting the United States on the basis of such geographic areas and economic sectors as may be appropriate to meet adequately the needs of—

* * * * *

(3) such other officers and employees of the United States in whom have been vested, or to whom have been delegated energy-related policy decisionmaking responsibilities[.]

Section 205(h)(2) of the Department of Energy Organization Act, 42 U.S.C. (Supp. III) 7135(h)(2), provides in pertinent part:

The Administrator [of the Energy Information Administration] shall develop and make effective * * * the format for an energy-producing company financial report. The report shall be designed to allow comparison on a uniform and standardized basis among energy-producing companies and shall permit for the energy-related activities of such companies—

* * * * *

(B) an analysis of the competitive structure of sectors and functional groupings within the energy industry[.]

Section 102(12) of the Department of Energy Organization Act, 42 U.S.C. (Supp. III) 7112(12), provides in pertinent part:

The Congress * * * declares that the establishment of a Department of Energy is in the public interest and will promote the general welfare by assuring coordinated and effective administration of Federal energy policy and programs. It is the purpose of this chapter—

* * * * *

(12) to foster and assure competition among parties engaged in the supply of energy and fuels[.]

## STATEMENT

Petitioners Shell Oil Company and seven other major energy companies brought this action against the Department of Energy and its component agency, the Energy Information Administration (EIA), seeking a declaration that EIA's annual financial reporting requirement (Form EIA-28) for 27 major energy-producing companies is unlawful. Petitioners alternatively sought an order enjoining the EIA and Department of Energy from releasing any proprietary financial information reported on Form EIA-28 to any other governmental agency. The district court and court of appeals denied petitioners the relief they sought, concluding that the Financial Reporting System and Form EIA-28 were lawfully developed and promulgated and that the EIA and Department of Energy had authority to release information reported on Form EIA-28 to other agencies of the government, including the Department of Justice and the Federal Trade Commission.

1. The Financial Reporting System (FRS) challenged in this litigation is a system for collection, analysis and dissemination of financial and operational data concerning the energy-production industry. Pet. App. B-2; 43 Fed. Reg. 27056 (1978). The reporting form (Form EIA-28) requires disclosure of each reporting company's total revenues, expenditures, profits, investments, and general financial operations. Certain information also must be disclosed concerning the types of energy produced (*e.g.*, petroleum, coal, nuclear) and the types of activity involved (*e.g.*, production, refining and marketing). 44 Fed. Reg. 2759 (1979). The objectives of the FRS are set forth in Section 205(h) of the Department of Energy Organization Act (DOE Act), 42

U.S.C. (Supp. III) 7135(h).[1] Pursuant to this broad statutory directive, the FRS was designed to collect data useful in the evaluation and analysis of the interrelated policy issues of "competition," "energy supply development," and "the impact of governmental actions on the energy sector." 43 Fed. Reg. 27056 (1978). These matters were considered by EIA to be "major energy policy concerns" that could be addressed through analysis of the data provided by the FRS (C.A. App. 1565, 1565-1568).[2]

2. The background of the FRS sheds additional light on its intended scope. The FRS was originally conceived following enactment of the Federal Energy Administration Act of 1974 (FEA Act). That Act authorized the FEA Administrator to require financial reports from energy-

---

[1]Section 205(h)(2) of the DOE Act, 42 U.S.C. (Supp. III) 7135(h)(2), directs the EIA Administrator to develop

> an energy-producing company financial report. Such report shall be designed to allow comparison on a uniform and standardized basis among energy-producing companies and shall permit for the energy-related activities of such companies—
>
> (A) an evaluation of company revenues, profits, cash flow, and investments in total, for the energy-related lines of commerce in which such company is engaged and for all significant energy-related functions within such company;
>
> (B) an analysis of the competitive structure of sectors and functional groupings within the energy industry;
>
> (C) the segregation of energy information, including financial information, describing company operations by energy source and geographic area;
>
> (D) the determination of costs associated with exploration, development, production, processing, transportation, and marketing and other significant energy-related functions within such company; and
>
> (E) such other analyses or evaluations as the Administrator finds is necessary to achieve the purposes of this chapter.

[2]"C.A. App." refers to the appendix in the court of appeals.

producing companies. Section 13 of the Act, 15 U.S.C. 772. Preliminary work was commenced in 1975 in an effort to develop an effective reporting system. 40 Fed. Reg. 43612 (1975). The scope of the information system was clarified by an August 1976 amendment to the FEA Act, which required the FEA to establish a "National Energy Information System" containing energy information appropriate "to meet adequately the needs" of FEA, Congress, and "other officers and employees of the United States" having "energy-related policy decisionmaking responsibilities." Section 52(a) of the Act, 15 U.S.C. 790a(a).

In connection with his April 20, 1977, address to Congress announcing his national energy plan, the President stated that his administration would implement the National Energy Information System by developing comprehensive and accurate energy information needed to serve the public interest in the energy field. 13 Weekly Comp. of Pres. Doc. 566, 576-577 (Apr. 25, 1977). The President advised that, in times of increasing scarcity, "competition among energy producers" must be guaranteed. *Id.* at 572. He added that his administration would utilize the National Energy Information System to assure "[s]trict enforcement of the antitrust laws." *Ibid.*

Meanwhile, the administration's bill to establish the Department of Energy (S. 826, 95th Cong., 1st Sess.) had been introduced on March 1, 1977. 123 Cong. Rec. 5666 (1977). In the course of committee hearings on that bill, a provision was added requiring the Department of Energy's proposed Energy Information Administration to develop a comprehensive system of mandatory financial reporting by major energy firms. See 123 Cong. Rec. 15270 (1977). The sponsor of the bill, Senator Ribicoff, stated on the Senate floor: "The provision is consistent with the President's concerns expressed in his April 20, National Energy Plan." *Id.* at 15276.[3] That provision became Section 205(h) of the

[3]See also S. Rep. No. 95-164, 95th Cong., 1st Sess. 51 (1977).

DOE Act (see note 1, *supra*). The DOE Act also vested in the EIA Administrator the responsibility for developing "a central, comprehensive, and unified" energy data base for the federal government. Section 205(a)(2), 42 U.S.C. (Supp. III) 7135(a)(2). The current format of the FRS was the result of approximately one year of intense review and development by the EIA between October 1977 and June 1978.

3. Consistent with Section 52 of the FEA Act[4] the energy agency (initially the Federal Energy Administration and later the EIA) invited various other agencies of the government to provide their comments and suggestions concerning the FRS. Two such agencies were the Department of Justice and the Federal Trade Commission.

Most of the specific suggestions made by the Department of Justice and Federal Trade Commission concerned the need for greater factual detail in the FRS. EIA gave careful consideration to all suggestions, reviewing in each case the question whether the particular suggestion would meet the overall purposes of the FRS, whether it was feasible, whether the information in question already was available elsewhere, and whether undue burdens would be placed on reporting companies. It accepted certain suggestions tendered by the antitrust enforcement agencies and rejected others. The system, as finally implemented, was intended to (C.A. App. 422):

> serve a useful purpose by broadly delineating the structure of the industry and by discerning significant changes in market structure and performance. For

---

[4]As previously noted, Section 52(a) of the FEA Act requires the development of a National Energy Information System appropriate "to meet adequately the needs" of the energy agency, Congress, and "other officers and employees of the United States" having "energy-related policy decisionmaking responsibilities." 15 U.S.C. (Supp. III) 790a(a).

> antitrust purposes, FRS is most effective as an early warning system making possible a broad first level surveillance for indications of potentially anticompetitive directions.

Thus, while the Justice Department and FTC strongly urged the adoption of their various suggestions, "EIA made the ultimate decisions regarding the design and content of the report form" (Pet. App. B-19).[5]

In conjunction with its promulgation of Form EIA-28, EIA issued a statement of guidelines to be used in making EIA-28 data available to the Department of Justice, the FTC, the Department of the Interior, and the General Accounting Office, when such information is needed by those agencies to carry out their "lawful duties and responsibilities." See 44 Fed. Reg. 2760 (1979).

4. Petitioners filed this suit in March 1979 in the United States District Court for the District of Delaware. They challenged the participation by the Department of Justice and the Federal Trade Commission in EIA's development of Form EIA-28 and EIA's decision to share company-specific EIA-28 data with the Department of Justice and FTC. Both sides moved for summary judgment.

The district court upheld the legality of Form EIA-28 in all respects (Pet. App. B). The court acknowledged that

---

[5]There is no evidence in the record suggesting that the EIA turned over its responsibilities for the design of the financial report to the antitrust agencies or that that design was dictated by those agencies. All information required by Form EIA-28 is needed by EIA to fulfill its responsibilities for information gathering and analysis under Section 205(h) of the DOE Act, regardless of whether the information also serves needs of the antitrust agencies. In the district court, petitioners identified no "particular data-element requests" on Form EIA-28 that were objectionable (Pet. App. B-18) and "failed to point out any specific inquiry of EIA-28 which is not designed to elicit information having value for energy policy planning purposes" (Pet. App. A-6; see also Pet. App. B-20).

officials of the Department of Justice and FTC had participated in the development of the form by making suggestions to EIA for modification of the form; that the purpose of those suggestions was to "obtain information relevant to the antitrust responsibilities of the DOJ and the FTC"; that some of the suggestions of these agencies were incorporated into the final form; and that Form EIA-28, as finally adopted, requires information about petitioners "which would be relevant to an analysis of whether there are or are not antitrust violations in various lines of commerce in the energy industry" (Pet. App. B-19). The court held, however, that "EIA made the ultimate decisions regarding the design and content of the report form and declined to adopt a number of suggestions vigorously pressed by the DOJ and FTC" (*ibid.*).

The court also held that the EIA has statutory authority to collect all of the data sought by Form EIA-28, including "information relevant to the presence or absence of competition in the energy industry." The court cited Section 205(h) of the DOE Act in reaching that conclusion (Pet. App. B-22). The court observed that "Congress intended that the EIA would collect data for the benefit of the FTC and the DOJ and, accordingly, * * * there is nothing improper about its intending to do so" (*id.* at B-23). In rejecting petitioners' contention that consultation by the EIA with the Department of Justice and FTC was unlawful, the court stated that Congress has "expressly authorize[d] these three agencies to confer concerning their information needs" (*ibid.*). Finally, the district court ruled that disclosure of information collected by the EIA to the Department of Justice and FTC to carry out their statutory responsibilities was in all respects lawful (*id.* at B-33 to B-44).

The court of appeals affirmed (Pet. App. A). The court pointed out that (Pet. App. A-5 to A-6):

> [s]ince the statute itself [the DOE Act] shows that Congress saw a nexus between energy policy planning

> and competition, we cannot find that information which is sought because it may be relevant to antitrust policy and enforcement is, *ipso facto*, sought for an improper purpose.

In reaching that conclusion, the court relied on Sections 102(12) and 205(h) of the DOE Act, 42 U.S.C. (Supp. III) 7112(12) and 7135(h), and Sections 12(f) and 52(a) of the FEA Act, 15 U.S.C. 771(f) and (Supp. III) 790a(a) (see pages 1-2, *supra*). In sum, the court found "no basis to interfere with the agency's fulfillment of its statutory obligations to collect data" and no impropriety in its decision to disseminate information to the Department of Justice and FTC for antitrust evaluation (Pet. App. A-5 to A-7).

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court. Other than the courts below, no court has ruled on the question whether EIA's financial reporting requirement is authorized by law. And no other court has addressed the question whether the particular statutes here involved contemplate cooperation between the Department of Energy and the antitrust enforcement agencies in developing and utilizing the energy information base. We are aware of no pending or impending litigation in the lower federal courts that would be affected by a ruling by this Court on these issues. Review by this Court at this time therefore is unwarranted.

1. Petitioners argue (Pet. 9) that review by this Court is warranted because of the "enormous increase" in the investigative powers of the antitrust enforcement agencies created by the judgment below. In support of this argument, petitioners contrast the information-gathering powers of the Department of Justice and FTC, which are limited to specific investigations or proceedings, with the annual financial reporting system of the Energy Information Adminis-

tration, which extends to the "competitive structure" of the energy-producing industry. 42 U.S.C. (Supp. III) 7135(h)(2)(B). There is no merit to this contention.

The subpoena powers of the Department of Justice and the FTC are prescribed in the Antitrust Civil Process Act and the Federal Trade Commission Act (15 U.S.C. 1312; 15 U.S.C. 46, 49). These provisions authorize the antitrust enforcement agencies to obtain directly from private parties information relevant to their enforcement responsibilities. These investigative powers extend to all lines of commerce and are not limited to energy production companies. Neither of these statutes purports to limit the Department of Justice or the FTC in their cooperative interaction with other government agencies, which often acquire information relevant to the enforcement of the antitrust laws.

Petitioners nevertheless argue (Pet. 12) that the DOE Act "nowhere mentions any responsibility [imposed on EIA] of cooperating or coordinating with the Department of Justice or the FTC with respect to antitrust." But Section 52 of the FEA Act (which is incorporated in the DOE Act),[6] creates just such a responsibility through its mandate to the EIA to develop a "National Energy Information System" containing energy information appropriate to meet the needs of "other officers and employees of the United States in whom have been vested * * * energy-related policy decisionmaking responsibilities." 15 U.S.C. (Supp. III) 790a(a)(3).[7] See also Section 56(b)(1) of the FEA Act, 15 U.S.C. 790e(b)(1) (coordination respecting energy information needs of other agencies). As the district court and court of appeals correctly concluded (Pet. App. A-6 to A-7, B-41 to B-42), the Department of Justice and FTC clearly have "energy-related policy decisionmaking responsibilities," because

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[6]See Section 205(c), 42 U.S.C. (Supp. III) 7135(c).

[7]Petitioners fail to discuss or even cite this statute in their petition.

they are charged with economic analysis and decisionmaking regarding competition and antitrust enforcement in the energy-production industry. Under the DOE Act, moreover, assurance of competition in the energy-producing industry is expressly stated to be one of the basic goals of national energy policy (42 U.S.C. (Supp. III) 7112(12)). And analysis of the "competitive structure" of the energy-producing industry is an expressly stated objective of the financial reporting system mandated by the Act (see 42 U.S.C. (Supp. III) 7135(h)(2)(B)). In view of these provisions of the energy statutes, and their legislative history,[8] there can be no doubt that Congress affirmatively "intended FRS data to be utilized in ascertaining the presence or absence of competition in the energy industry and the use of FRS authority to collect data for that purpose is not a misuse or abuse of that authority" (Pet. App. B-20).[9]

Although petitioners "do not argue * * * that DOE has been give[n] unconstitutional powers" (Pet. 15), they do suggest that EIA's annual reporting requirements may raise constitutional questions, apparently because the reports do not pertain to a specific investigation or proceeding (Pet. 15-16). This assertion also is insubstantial. Nearly all highly regulated industries are subject to periodic inspection or reporting requirements. No judicial authority cited by petitioners suggests that such requirements, when rationally related to a legitimate governmental objective, are unconstitutional. See *Shapiro* v. *United States*, 335 U.S. 1, 32

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[8]See pages 4-5, *supra*.

[9]As the district court explained, under the federal energy statutes "no meaningful dichotomy can be drawn between energy planning data and information concerning the presence or absence of competition in the energy industry" (Pet. App. B-20; see also *id.* at A-5).

(1948); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950); *United States* v. *Biswell*, 406 U.S. 311, 316-317 (1972).[10]

2. Because Congress has expressly authorized the EIA to collect financial data to facilitate analysis by other agencies of competition in the energy industry, this Court's decision in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), is inapposite. In *LaSalle*, this Court reversed a decision of the court of appeals that had refused to enforce an IRS summons because the sole motivation of the individual agent conducting the case was to gather evidence for a criminal prosecution. The Court held that the statutory prohibition against use of an IRS summons following a recommendation for criminal enforcement should apply only after IRS has determined institutionally to recommend criminal prosecution.[11] The decision involved only the construction of IRS statutes. 437 U.S. at 307-313. The rule recognized in *LaSalle*—that it is improper to use an IRS summons for criminal investigation following a recommendation for criminal prosecution—is irrelevant in the present case not only because this case arises under a wholly separate statutory scheme, but also because there is no suggestion that the EIA is collecting information solely for the purpose of commencing a criminal prosecution.

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[10]Although petitioners suggest (Pet. 16) that requiring this information is equivalent to " 'indiscriminate rummaging among [their] records,' " they wholly fail to demonstrate that the required information is unrelated to the objectives of Congress in creating a national energy production data bank.

[11]An IRS summons is not properly employed following a recommendation for criminal prosecution because, at that stage, the Department of Justice has sole responsibility for the case in both its civil and criminal aspects. See *Donaldson* v. *United States*, 400 U.S. 517, 535-536 (1971).

More fundamentally, there is no basis for the assertion that the EIA acts with an "improper purpose" (Pet. 17) when it collects information bearing on competition in the energy production industry. In contrast to *LaSalle*, there is no doubt here that Congress intended the EIA to gather such information and to share it with responsible government agencies having a decisionmaking role in relation to the energy industry. Thus, even if the "improper purpose" doctrine of *LaSalle* extends beyond criminal tax cases, petitioners here have made no showing of improper use of investigative powers.[12]

3. Petitioners also argue (Pet. 19) that the lower courts have differed concerning the application of *LaSalle* in various statutory contexts. They contend that the D.C. Circuit's decision in *SEC* v. *Dresser Industries, Inc.*, 628 F. 2d 1368 (1980) (en banc), cert. denied, No. 80-354 (Nov. 17, 1980), conflicts with the decision of the Third Circuit here. There is no merit to that assertion. In *Dresser*, the D.C. Circuit concluded that "IRS investigative and enforcement proceedings are not analogous to those of the SEC." 628 F. 2d at 1379. Accordingly, the court ruled that an SEC civil investigation could proceed in tandem with a grand jury investigation and that information collected in the civil investigation could be transmitted to the grand jury. The court's decision rested on a detailed examination of the terms and legislative history of the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.* 628 F. 2d at 1379-1380, 1384-1387. In contrast to the situation in *LaSalle*, the court of appeals in

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[12]This Court repeatedly has recognized that the fruits of civil investigations may be shared with the Department of Justice when the civil investigation has an independent basis. See *United States* v. *Kordel*, 397 U.S. 1, 11-13 (1970); *Standard Sanitary Mfg Co.* v. *United States*, 226 U.S. 20, 51-52 (1912).

*Dresser* found that the SEC's authority to issue subpoenas remained undiminished after the start of a grand jury investigation. The decision of the court of appeals in *Dresser*, which examined the relevant statutory provisions and legislative history to determine if Congress intended to preclude inter-agency cooperation, is perfectly consistent with the decision of the court of appeals in this case, which undertook a similar analysis. There is no basis for inferring that the D.C. Circuit would reach a result different from that of the Third Circuit in the present case if it were to review the provisions and legislative history of the Federal Energy Administration Act of 1974 and the Department of Energy Organization Act.[13]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

THOMAS S. MARTIN
*Acting Assistant Attorney General*

MICHAEL KIMMEL
*Attorney*

FEBRUARY 1981

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[13]Whether the reasoning of *LaSalle* applies in a particular case depends upon the nature of the statutory scheme before the court. No decision cited by petitioners (Pet. 19-20) suggests that any court would reach the conclusion that it is improper for the Department of Energy to cooperate with the Department of Justice and the Federal Trade Commission in implementing the procompetitive goals expressed in the federal energy statutes.

No. 80-924

# In the Supreme Court of the United States

OCTOBER TERM, 1980

SHELL OIL COMPANY, ET AL., PETITIONERS

*v.*

DEPARTMENT OF ENERGY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENTS

WADE H. MCCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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**SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENTS**

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We submit this supplemental memorandum in response to petitioners' assertion, raised in their reply brief, that the petition in this case should be granted to resolve a "conflict between the circuits" resulting from the Third Circuit's recent decision in *SEC* v. *Wheeling-Pittsburgh Steel Corp.*, No. 80-1375 (3d Cir. Jan. 21, 1981) (en banc).

There is no conflict between the circuits. In *SEC* v. *Dresser Industries, Inc.*, 628 F. 2d 1368 (D.C. Cir. 1980) (en banc), cert. denied, No. 80-354 (Nov. 17, 1980), the court of appeals approved sharing by the SEC and the Department of Justice of certain information relevant to parallel grand jury and administrative investigations. *Wheeling-Pittsburgh* dealt with the unrelated issue whether a district court should enforce an SEC subpoena in the face of allegations that the SEC had succumbed to political pressure in issuing

the subpoena and had made no independent determination that an investigation was warranted. *Wheeling-Pittsburgh* did not consider the question decided in *Dresser*—whether the SEC has authority to coordinate with other enforcement agencies in securing and sharing information.[1]

This case, in contrast to *Wheeling-Pittsburgh* and *Dresser*, deals solely with the authority of the Energy Information Administration to coordinate its information gathering activities with those of other agencies of the federal government pursuant to the interrelated federal energy statutes described in our brief in opposition (Br. in Opp. 3-6). The Third Circuit's analysis of that issue has no relationship to its analysis of the subpoena enforcement issue in *Wheeling-Pittsburgh*, or the D.C. Circuit's analysis of interagency cooperation under the federal securities laws in *Dresser*.

Because there is no conflict in the circuits on the issue of statutory interpretation presented in this case, and because

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[1]In *Wheeling-Pittsburgh*, the Third Circuit "assume[d] * * * that the same standards are applicable to enforcement of SEC subpoenas as Internal Revenue Service summonses" (slip op. 11 n.5). This "assumption" can hardly be construed as a rejection of the holding in *Dresser* (628 F. 2d at 1378) that the SEC and Department of Justice may share information without infringing the rule announced by this Court in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978). In any event, even if *Wheeling-Pittsburgh* could be construed somehow to conflict with *Dresser*, it is difficult to understand why the Court should grant certiorari in *this* case. The petition does not allege that the decision below conflicts with either *Dresser* or *Wheeling-Pittsburgh*.

that issue was correctly resolved by the court of appeals, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

FEBRUARY 1981

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FILED

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ALEXANDER L. STEVAS,
CLERK

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## REPLY BRIEF OF THE PETITIONERS IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI

ROBERT H. BORK
142 Huntington Street
New Haven, Connecticut 06511
(203) 776-7662

J. WALLACE ADAIR
ROGER C. SIMMONS
MARCIA D. WELSCH
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800

*Counsel of Record for Petitioners*

February 17, 1981

[List of Attorneys on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

*Of Counsel:*

A. M. MINOTTI
Shell Oil Company
P. O. Box 2463
Houston, Texas 77001

*Attorney for Shell Oil Company*

ROBERT D. WILSON
Texaco Inc.
2000 Westchester Avenue
White Plains, New York 10650

*Attorney for Texaco Inc.*

LEWIS J. OTTAVIANI
Phillips Petroleum Company
1240 Adams Building
Bartlesville, Oklahoma 74004

*Attorney for Phillips Petroleum Company*

CARLA BISHOP
Coastal Corporation
9 Greenway Plaza, Suite 894
Houston, Texas 77046

*Attorney for Coastal States Gas Company (Coastal Corporation)*

JOHN E. BAILEY
The Gulf Companies
P. O. Box 3725
Houston, Texas 77001

*Attorney for The Gulf Companies*

CHARLES F. RICE
Mobil Oil Corporation
150 East 42nd Street
New York, New York 10017

*Attorney for Mobil Oil Corporation*

EDWARD A. MCFADDEN
Union Oil Company of California
911 Wilshire Boulevard, Suite 1140
Los Angeles, California 90017

*Attorney for Union Oil Company of California*

DAVID M. FRANCIS
MONA A. YOES
Conoco Inc.
P. O. Box 2197
Houston, Texas 77001

*Attorneys for Continental Oil Company (Conoco Inc.)*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## REPLY BRIEF OF THE PETITIONERS IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI

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This reply brief addresses new matters occurring since petitioners' original filing, as well as the arguments raised in the Department of Energy's ("DOE") brief in opposition.

### I. SINCE PETITIONERS' ORIGINAL FILING, THE CONFLICT BETWEEN THE CIRCUITS CONCERNING THE SCOPE OF THE *LASALLE* DOCTRINE HAS BECOME ACUTE.

Subsequent to the filing of this petition for a writ of certiorari, the Third Circuit, sitting *en banc*, decided

*SEC* v. *Wheeling-Pittsburgh Steel Corp.*, No. 80-1375 (3d Cir. Jan. 21, 1981), a case involving the *LaSalle* doctrine.[1] Its decision is in direct conflict with the District of Columbia's Circuit's recent *en banc* holding in *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368 (D.C. Cir.), *cert. denied*, 101 S. Ct. 529 (1980). The Third Circuit held that the *LaSalle* doctrine, which was created in the context of civil Internal Revenue Service summonses which were misused for criminal investigative purposes, applied equally to SEC subpoenas as well as other agencies' information demands, while the District of Columbia Circuit held that *LaSalle* applied "solely to the statutory scheme of the Internal Revenue Code." *Compare Wheeling-Pittsburgh*, slip op. at 11 n. 5 and 15 with *Dresser* at 1378.

This petition squarely raises the issue which this Court expressly left unresolved in *LaSalle*[2] and upon which these two *en banc* courts of appeal are in conflict. As the Third Circuit noted in *Wheeling-Pittsburgh*, "[u]p to the present time, the decisions of the [Supreme] Court have addressed only the use of civil summons authority in furtherance of a criminal investigation, and the Court therefore has had the opportunity to recognize only that abuse as a basis for invalidating an IRS summons." Slip Op. at 12-13. Thus, there is now a square conflict between *en banc* circuit courts which requires resolution by this Court in this case.

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[1] *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978).

[2] In *LaSalle*, this Court stated, "[t]hese requirements are not intended to be exclusive. Future cases may well reveal the need to prevent other forms of agency abuse of congressional authority and judicial process." 437 U.S. at 318 n. 20.

## II. THIS CONFLICT BETWEEN THE CIRCUITS IS RIPE FOR RESOLUTION IN THIS CASE SINCE, CONTRARY TO THE DOE'S ASSERTION, CONGRESS DID NOT INTEND THE DOE TO ACT AS THE DISCOVERY ARM OF THE ANTITRUST LAW ENFORCEMENT AGENCIES.

The DOE presents only one argument in opposition to this petition. The DOE's entire case stands or falls upon the claim that Section 52 of the Federal Energy Administration Act of 1974 ("FEA Act"), 15 U.S.C. § 790a (1976 & Supp. I 1977), manifests a clear intent by Congress that DOE should gather information in the Financial Reporting System ("FRS") for use by the Department of Justice and the Federal Trade Commission ("FTC") in antitrust prosecutions.[3] That reading of Section 52 cannot survive analysis.

The provision in question created a "National Energy Information System" which was to contain information needed to facilitate analysis of energy supply and consumption to meet the needs of the FEA (now DOE), Congress, federal officers and employees with energy-related policy decisionmaking responsibilities and the States. 15 U.S.C. 790a(a) (1976 & Supp. I 1977). The obvious meaning of the statute's text is that information should be generated for and shared with energy policymakers, a category that does not include the law enforcement officers of the Department of Justice and the FTC.[4] Congress also emphasized the FEA's "statis-

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[3] The DOE's brief in opposition also relies upon Sections 102 (12) and 205(h) of the Department of Energy Organization Act ("DOE Act"), 42 U.S.C. §§ 7112(12) and 7135(h) (Supp. II 1978). The DOE has raised no arguments which were not dealt with in the petition. (*See* Pet. at 9-14.)

[4] A review of FTC and Department of Justice energy policy duties explains why the DOE failed to identify them for this Court. Those limited Department of Justice and FTC duties which

tical and forecasting activities," making no mention of any antitrust law enforcement activities. 15 U.S.C. § 790a (b) (1976).

This interpretation is made conclusive by other principles of statutory construction. Nowhere in the legislative history of the FEA Act or the DOE Act is there any mention whatever of the radical expansion of discovery powers which the DOE now claims were deliberately conferred on the Department of Justice and the FTC. (Pet. at 9-12.) That such a revolution in the powers previously thought appropriate to prosecutorial agencies should have gone wholly unremarked by proponents and opponents alike surpasses belief. Moreover, as we showed in the petition, at 12-14, the structure of the relevant statutes forbids the DOE's conclusion.

These considerations, standing alone, are enough to demonstrate that the Department of Justice and the FTC, acting through the DOE, have usurped powers not granted them. But these considerations do not stand alone. As petitioners have shown, the DOE's reading of the statute raises serious constitutional issues by giving the Department of Justice and the FTC inquisitorial powers exceeding those they would have under a constitutionally forbidden general warrant or writ of assistance.[5] (Pet. at 15-16.)

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impact on energy policy involve review of applications for gas, oil and coal leases on federal lands, 43 U.S.C. § 1337(c) (Supp. III 1979) and 30 U.S.C. § 184(l)(2) and § 208-2 (1976); reviewing applications for deepwater port licenses, 15 U.S.C. § 788(c) (Supp. II 1978) and 33 U.S.C. § 1506 (1976); and a one-time study of subsidization of wholesale and retail motor fuel sales by vertically integrated oil companies. 15 U.S.C. §§ 2801, *et seq.* (Supp. II 1978). None of these limited "policy" duties even skims the surface of the data collected by the FRS.

[5] The DOE's argument that "[n]early all highly regulated industries are subject to periodic inspection or reporting requirements," is simply irrelevant. (Brief for Respondents at 11.) Pe-

For these reasons, the energy statutes must not be read to grant the extraordinary powers the DOE claims. Thus, the question of the applicability of the *LaSalle* doctrine is squarely raised.

## III. THE RECORD BELOW ESTABLISHES THAT THE DEPARTMENT OF JUSTICE AND THE FTC REWROTE THE FRS FORM FOR USE IN THEIR LAW ENFORCEMENT ACTIVITIES.

An essential point glossed over by DOE is the extent and nature of the FTC's and Department of Justice's participation in the FRS. Neither agency approached the DOE as a "policy consultant." Indeed, each agency bluntly and candidly insisted that the DOE include data for use in their own *law enforcement* endeavors.

For example, on July 11, 1977, Assistant Attorney General John H. Shenefield sent a letter to FEA demanding changes in the FRS for antitrust law enforcement purposes. (C. A. App. 1027-30.)[6] Shenefield stated that drafting the FRS in the manner urged by Justice would "facilitate and expedite antitrust enforcement" and that company-specific FRS data should be available to Justice "on demand for specific investigations [and] litigation." (C. A. App. 1028.) On August 12, 1977, the FTC criticized the early FRS as an inadequate antitrust enforcement tool. (C. A. App. 1086.) FTC Bureau of Competition Director Alfred F. Dougherty addressed ten areas of FTC concern, stating that the FRS, as then formulated, would not permit "the development of informed antitrust initiatives" and that "[i]f the FRS data [are] to have any real usefulness to the FTC's antitrust en-

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titioners do not claim that the statutes relied upon are unconstitutional, but that they have been interpreted by the lower courts in an unconstitutional way.

[6] "C. A. App." refers to the appendix in the Court of Appeals.

forcement efforts, then that data must be made available to us on an individual company basis." (*Id.*)

The FTC and the Department of Justice reworked the FRS form from the viewpoint of antitrust litigants, as advocates involved in ongoing lawsuits—not as policy advisors enlightening a sister agency. The FTC openly acknowledged that the FRS respondents were defendants in cases the agency was "currently litigating, *Exxon Corp., et al.*, D. 8934" and that the FRS would help it prove its case. (C. A. App. 1410.)

The uncontroverted record below belies any suggestion that these antitrust agencies acted in a consultative capacity. In fact, they suggested and demanded changes in the FRS to accommodate their own law enforcement needs. The alteration of this form from 600 data elements to include more than 7200 data elements at the demand of these law enforcement agencies is a devastating response to the DOE's repeated claim that it was the so-called "ultimate decisionmaker." The ironic aspect of this case is that these facts were uncontested below. A misleading restatement of them now should not be allowed to obscure the real issue or the importance of the lower court precedent.

## IV. CONTRARY TO THE DOE'S SUGGESTION, THIS CASE PRESENTS QUESTIONS OF BROAD SIGNIFICANCE CONCERNING THE PROPER RELATIONSHIP BETWEEN LAW ENFORCEMENT AND REGULATORY AGENCIES.

The DOE's attempt to paint this as a single case without general significance is entirely misleading. If left standing, the decision below will affect countless cases and investigations unrelated to the FRS. The rationale

of the opinion offers the DOE's investigative power to all federal agencies and departments who wish to use it.[7]

In addition, the decision below affects currently pending cases by permitting the FTC and the Department of Justice to use the DOE as an instrumentality for creation of antitrust law enforcement data to be used in those cases. The Court of Appeals sanctioned such uses of the FRS as that exercised here by FTC complaint counsel in the FTC's pending proceeding, *In Re Exxon Corp., pending as* FTC Dkt. No. 8934, when counsel inserted questions into the FRS. Petitioners' FRS information was also created for the Department of Justice's unit investigating alleged worldwide petroleum company price-fixing and market allocation (*See* Civil Investigative Demand Issued to Gulf Oil Corporation on August 27, 1979, reproduced at C. A. Add. 373-80.)[8]

Finally, while twenty-six energy-producing companies are presently compelled indefinitely to submit the FRS reports to DOE on an annual basis, the reporting requirement will soon be expanded to include 300 reporting companies. 44 Fed. Reg. 2578 (1979). The lower court's holding has an almost conclusive effect on any challenges to the FRS by the remaining 270 plus companies.

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[7] In 1977, several agencies including the Bureau of Census, Department of Interior, SEC, General Accounting Office and Office of Management and Budget, in addition to the Department of Justice and FTC, were invited to participate in development of the FRS. (C. A. App. 1059.) With the exception of the Justice Department and FTC, these agencies thought it inappropriate to participate directly in formulation of the FRS, except in a generalized, nonspecific manner. The judgment below paves the way for extensive involvement by these agencies and an unlimited additional number of agencies in future DOE investigations.

[8] "C. A. Add." refers to the addendum of reference materials to petitioners' brief in the Court of Appeals.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT H. BORK
142 Huntington Street
New Haven, Connecticut 06511
(203) 776-7662

J. WALLACE ADAIR
ROGER C. SIMMONS
MARCIA D. WELSCH
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800

*Counsel of Record for Petitioners*

February 17, 1981